

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE SOUTHERN DISTRICT OF TEXAS**
 HOUSTON DIVISION

3 UNITED STATES OF AMERICA) NO. 4:21-CR-09
)
4) Houston, Texas
5 VS.) 1:13 p.m. to 6:00 p.m.
)
6 ROBERT T. BROCKMAN) NOVEMBER 16, 2021

7
8 *****

9 **COMPETENCY HEARING**

10 **AFTERNOON SESSION**

11 **BEFORE THE HONORABLE GEORGE C. HANKS, JR.**

12 **UNITED STATES DISTRICT JUDGE**

13 **DAY 2**

14
15 *****

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P R O C E E D I N G S

NOVEMBER 16, 2021

(1:13 p.m. to 6:00 p.m.)

01:25:10

(Defendant present.)

THE CASE MANAGER: All rise.

THE COURT: Please be seated, everyone.

Had you rested with the witness, sir?

MR. SMITH: Yes, Your Honor.

01:59:39

THE COURT: Then cross-examination.

MR. LOONAM: Your Honor, by agreement we are
going to take a witness out of order.

THE COURT: Oh, that's right.

01:59:45

MR. LOONAM: Yeah. The government has to get
somebody on a plane.

THE COURT: Okay. No problem.

Ready to call your next witness?

MR. BOURGET: Yes, Your Honor. The government
calls Michael Nemelka.

02:00:16

And, Your Honor, before we begin, I just
wanted to flag Mr. Nemelka is represented by Derek Ho from
the firm of Kellogg Hansen. Mr. Ho wanted me to just
highlight him, and he represented to me that on
cross-examination there may be questions that implicate the
attorney-client privilege; and, so, I told him I would

02:00:30

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 leave it up to him to raise that as appropriate.

2 THE COURT: Okay. Well, first, let me just
3 swear you in, sir. If you would raise your right hand.

4 (Witness sworn.)

02:00:47

5 THE WITNESS: I do.

6 THE COURT: You may take the stand.

7 And, Mr. Ho, if you would like to come
8 within the bar, that would be fine, in order to hear the
9 testimony because the acoustics in this room are such that

02:00:56

10 you might not be able to hear clearly back there.

11 MR. HO: Thank you, Your Honor.

12 THE COURT: And you may proceed when ready.

13 MR. BOURGET: Thank you, Your Honor.

14 **MIKE NEMELKA,**

02:01:06

15 duly sworn, testified as follows:

16 **DIRECT EXAMINATION**

17 BY MR. BOURGET:

18 Q. Good afternoon, Mr. Nemelka. Could you state your
19 full name and spell your last name for the record, please?

02:01:11

20 A. Yes. My name is Mike Nemelka. The last name is
21 spelled "N" as in "Nancy," E-M as in "Mary," E-L-K-A.

22 Q. And, Mr. Nemelka, where do you work?

23 A. I am a partner at the law firm Kellogg Hansen in
24 Washington, DC.

02:01:28

25 Q. Could you provide the Court with just a brief

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 professional background?

02:01:42

2 **A.** I graduated from the University of Virginia School of
3 Law in 2006, after which I clerked for Judge Paul Niemeyer
4 on the Fourth Circuit. And from there I joined Kellogg
5 Hansen as an associate and then became a partner. I was
6 then nominated and confirmed as the Deputy United States
7 Trade Representative, and then in December 2020 I returned
8 to Kellogg Hansen.

02:02:03

9 **Q.** And in your position as the Deputy U.S. Trade
10 Representative, does that come with a rank?

02:02:21

11 **A.** It does come with the rank of Ambassador, which only
12 my kids know to call me. Others do not. And my job at
13 USTR was -- my portfolio -- it's a deputy cabinet-level
14 position, and my portfolio was U.S. trading relationships
15 with Africa, the Western Hemisphere, and China. And then
16 I was also over environment, labor, services and
17 investment, and intellectual property, and textiles.

18 **Q.** Thank you. And do you know the defendant, Robert
19 Brockman?

02:02:36

20 **A.** I do.

21 **Q.** And how do you know him?

22 **A.** He was chairman and CEO of the Reynolds and Reynolds
23 company, which is a defendant in cases that I represent
24 clients against.

02:02:48

25 **Q.** Can you describe what that litigation is about?

MIKE NEMELKA - DIRECT BY MR. BOURGET

02:03:05

1 **A.** So, I represent clients in a multidistrict litigation
2 that is currently pending before Judge Robert Dow in the
3 Northern District of Illinois, and the Reynolds and
4 Reynolds company and their chief competitor, CDK, are
5 defendants in that case. And the gist of the claim is a
6 Section 1 conspiracy, that they coordinated their data
7 access policies and were able to charge super-competitive
8 prices for that data access as a result.

02:03:26

9 **Q.** Okay. And you said Section 1. Is that under the
10 Sherman Act?

11 **A.** It is under the Sherman Act, yeah.

12 **Q.** And what's the premise of your clients' claims
13 against Reynolds and Reynolds and CDK?

02:03:40

14 **A.** So, in 30 seconds, the primary product of the
15 Reynolds and Reynolds company and CDK is a dealer
16 management system software, which is the Enterprise
17 software that car dealerships use to run their business.
18 And that software has a database component where dealers
19 store their data, and my clients are the companies that
20 needed access to that data in order to perform their own
21 services for dealers, such as -- such as customer
22 relationship management, inventory management, service
23 reminders, you know, managing parts inventory. And my
24 clients were charged super-competitive prices for that
25 data access as a result of the alleged conspiracy between

02:03:53

02:04:13

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 CDK and Reynolds.

2 **Q.** Approximately, what's the amount at issue in the
3 case?

02:04:23

4 **A.** It's a significant case. Collectively, Reynolds is
5 facing a liability of over a billion dollars.

6 **Q.** And is this the first case you have litigated?

7 **A.** No, it's not.

8 **Q.** In comparison to other cases you have litigated, how
9 voluminous is the discovery in this case?

02:04:35

10 **A.** Being an MDL, it was -- I represent the direct
11 purchasers of the services, but the car dealerships also
12 were involved. We had competitors involved. It was --
13 and, so, there were millions and millions of pages
14 produced, over 90 depositions, dozens of experts. I was
15 on the road for basically five months straight taking and
16 defending depositions at one point.

02:04:52

17 **Q.** And was Mr. Brockman deposed as part of that
18 discovery?

19 **A.** Yes. I deposed him.

02:05:02

20 **Q.** And when did those depositions take place?

21 **A.** Mr. Brockman's deposition took place in January of
22 2019 over the course of two days.

23 **Q.** And was Mr. Brockman represented in those
24 depositions?

02:05:16

25 **A.** He was. He was represented by Andi Gulley of the law

MIKE NEMELKA - DIRECT BY MR. BOURGET

02:05:37

1 firm called Gibbs & Bruns based here in Houston, a very
2 good firm; and also by Michael Cohen of Sheppard Mullin.
3 Scott Cherry, the general counsel of Reynolds was also
4 there. And CDK had a lawyer there but obviously did not
5 represent Mr. Brockman.

02:05:53

6 **Q.** And from your -- from your perspective and your view,
7 how important was Mr. Brockman's deposition to the case?

8 **A.** Mr. Brockman and RV was one of the primary
9 co-conspirators of working with CDK to coordinate their
10 data access policies. He was the chairman, CO and owner
11 of Reynolds. He was one of the most important depositions
12 in the case.

02:06:05

13 **Q.** And how many depositions have you taken or defended
14 in your career?

15 **A.** My career? It's approaching triple digits.

16 **Q.** Have you deposed sophisticated individuals or
17 businessmen, executives such as Mr. Brockman before?

18 **A.** I have.

02:06:21

19 **Q.** And in terms of preparation and skill and -- yeah, in
20 terms of preparation and skill as a deponent, how would
21 you rate Mr. Brockman?

22 **A.** I found Mr. Brockman to be very well prepared and a
23 very skilled deponent.

24 **Q.** And are you able to rank him in a certain percentage?

02:06:35

25 **A.** I would say top five percent of the people I have

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 deposed in terms of preparation and skill as a witness.

2 You know, I came away with a grudging respect for him, for
3 sure.

4 **Q.** And what made him, you know, such a skillful
5 deponent?

02:06:51

6 **A.** I would say something that makes anybody a skillful
7 deponent. He was well prepared. He had met with his
8 attorneys for two days. He was very careful to make sure
9 he understood my questions. He answered carefully and
10 thoughtfully. He took time to make sure to formulate his
11 answers. He re -- you know, things that you tell your
12 clients to do.

02:07:05

13 He reviewed the documents in whole and
14 made sure he understood the context of e-mails or
15 presentations I put before him. And, you know,
16 substantively, he was careful to protect the case as well
17 as he could for -- for his company.

02:07:19

18 MR. BOURGET: And, Your Honor, just for the
19 record, the transcripts from those depositions have been
20 preadmitted as Exhibits 36 and 37. I also will be walking
21 Mr. Nemelka through some excerpts from the videos of those
22 depositions. The full videos are Exhibits 58 and 59, and
23 we will mark the clips separately.

02:07:34

24 BY MR. BOURGET:

25 **Q.** So, Mr. Nemelka, have you reviewed the transcripts of

02:07:49

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 the deposition since it took place?

2 **A.** I have.

3 **Q.** Have you reviewed the videos of the deposition since
4 it took place?

02:07:57

5 **A.** I have.

6 **Q.** And when did you last review the transcripts of the
7 video?

8 **A.** The video I reviewed again about a month ago, and
9 then the transcripts I've reviewed a few times. I

02:08:08

10 reviewed it again last night.

11 **Q.** And why did you review those materials?

12 **A.** Just to make sure that my memory was refreshed about
13 what was in the deposition.

14 **Q.** And was that for the purpose of this hearing?

02:08:18

15 **A.** It was.

16 **Q.** And who did you prepare with for this hearing?

17 **A.** I had a series of calls with Chris Magnani and Evan
18 Garrett, and Boris was on some of those calls. And then
19 my partner and -- and representation here, Derek Ho, was
02:08:38 20 also on some of those calls.

21 **Q.** And in preparing for the prosecution team, is it fair
22 to say that we discussed many portions of the deposition?

23 **A.** Yes. And just to be clear, I also met last night
24 with Boris and Evan Garrett.

02:08:50

25 **Q.** Thanks for that clarification.

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 Is it also fair to say that you brought
2 sections of the -- of the videos to our attention?

3 **A.** Right. We discussed Mr. Brockman's deposition, and I
4 highlighted certain portions for -- for you.

02:09:05

5 **Q.** So, we will get to those clips in a minute, but
6 before that I want to talk a little bit about bias.

7 Do you have any animosity towards
8 Mr. Brockman?

9 **A.** I do not.

02:09:14

10 **Q.** And have you considered the ways that this Court's
11 competency determination might affect the multidistrict
12 litigation and your clients' claims against Reynolds?

13 **A.** Of course. I would make that -- consider that. I
14 would say the main thing is that Mr. Brockman's deposition
02:09:32 15 that I took -- nobody's arguing that he was not competent
16 when I took it. So, Reynolds is relying on that
17 deposition, we're relying on it in the MDL, and there has
18 never been an argument by anybody in the MDL that that
19 deposition isn't admissible for any reason.

02:09:48

20 But it's true we're still litigating
21 against Reynolds in a high-stakes case. I haven't thought
22 of all the permutations of how a competency determination
23 could affect that. It doesn't affect the substantive
24 Section 1 claims, but it is true that we're still

02:10:03

25 litigating against Reynolds.

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 Q. And how many days did Mr. Brockman's deposition last?

2 A. It lasted over two days. It was originally scheduled
3 for one day at the end of 2018, but then counsel for
4 Reynolds called me and said that Mr. Brockman had a heart
02:10:24 5 condition, and they asked if we would accommodate him and
6 have it taken over two days. And, so, it was taken over
7 two days in January; one day three-and-a-half hours on the
8 record, and then the other day three-and-a-half hours on
9 the record.

02:10:38 10 And then his counsel did redirect on the
11 second day.

12 Q. And I think you mentioned a heart issue.

13 A. That was the reason that counsel gave us that it
14 needed to be split over two days, to make sure that he had
02:10:53 15 a break.

16 Q. Okay. And, so, other than this potential heart
17 issue, were any other health issues raised by Mr. Brockman
18 or his attorneys?

19 A. There were no other health issues that -- that
02:11:05 20 counsel raised that I can recall.

21 Q. Were there any mental or cognitive health issues
22 raised?

23 A. None that I can recall. I mean, actually, for mental
24 and cognitive, I know none were raised.

02:11:18 25 Q. Other than Mr. Brockman's attorneys, did anyone raise

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 to you any concerns about Mr. Brockman's cognitive health?

2 **A.** No.

3 **Q.** During the deposition did you feel like Mr. Brockman
4 understood your questions?

02:11:32

5 **A.** I -- I asked him that. I mean, as the standard
6 questions that you ask before a deposition, one of them I
7 asked was, "If you don't understand a question, please ask
8 for clarification. And if you answer we will have the
9 ground rule that the record will be that you did

02:11:46

10 understand it." And he -- he acknowledged that, and he at
11 times asked for clarification, but, otherwise, he -- he
12 answered my questions.

13 **Q.** Did you -- during the deposition did you ask
14 Mr. Brockman whether he prepared for the deposition?

02:12:03

15 **A.** Along with that list of questions that I typically
16 ask, one was if he had prepared for the deposition, and he
17 said that he had met with his lawyers over the course of
18 two days for most of the day both days. I think he said
19 three-quarters of the day each day.

02:12:23

20 **Q.** Okay. So, I would like to now play the first clip.
21 This clip is about seven minutes long. It's the longest
22 one that we have out of the list.

23 (Video played.)

24 THE COURT: I don't see anything.

02:13:02

25 THE WITNESS: One clarification for the Court.

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 I took the deposition on the first day,
2 and then my colleague, Peggy Wedgworth, who represents the
3 dealers in the MDL, took the deposition on the second day.

4 THE COURT: Okay.

02:13:13

5 THE WITNESS: So, you may hear her asking
6 questions, too.

7 THE COURT: Not a problem. Thank you.

8 *****

9 **(Video played as follows.)**

02:13:25

10 **Q.** ...September 2015 after this pitch was made?

11 UNIDENTIFIED SPEAKER: Objection.

12 **A.** A really, really unhappy thing. They issued
13 termination notices to us and announced that they are
14 going to CDK, and I was, you know, very disappointed.

02:13:43

15 **Q.** They signed a contract with CDK?

16 UNIDENTIFIED SPEAKER: Objection.

17 **A.** Yes, they did.

18 **Q.** So, they switched to CDK?

19 UNIDENTIFIED SPEAKER: Objection.

02:13:50

20 **A.** They didn't switch yet.

21 **Q.** They decided to switch?

22 UNIDENTIFIED SPEAKER: Objection.

23 **A.** They decided to switch. They contracted to switch.

24 **(Video stopped.)**

02:13:54

25 *****

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 MR. BOURGET: Just pause it.

2 BY MR. BOURGET:

3 Q. Mr. Brockman is talking about a switch there. Can
4 you describe what that switch was about?

02:14:03

5 A. Yes. And one other clarification. This was actually
6 on redirect the second day. That was his own lawyer
7 asking him the question.

8 THE COURT: Okay.

02:14:13

9 A. And what this is talking about is Hendrick Automotive
10 Group, which is one of the largest automotive groups in
11 the nation, is a Reynolds client, and had announced that
12 they were going to switch to CDK, the competitor, and it
13 was -- it was a switch that failed. They were not able to
14 successfully switch dealer management systems from
15 Reynolds to CDK, which in our case one of our arguments is
16 that it is very hard for dealers to switch. They're
17 locked in. It's a sticky product. And, so, it -- it's a
18 good fact for my clients that the largest dealership tried
19 to switch but failed.

02:14:31

02:14:50

20 MR. BOURGET: Go ahead and continue the video.

21 *****

22 **(Video played as follows:)**

02:15:04

23 A. And then -- which is a further -- you know, a longer
24 story, that they decided to switch. And then, as the
25 switch began, it began first with a very small dealership

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 that was basically a new start, and they had all new
2 people, and it was, you know, therefore, a pretty easy,
3 pretty simple conversion job. This went okay.

02:15:20

4 The second dealership that they converted
5 was a monster Toyota dealer which is within eyesight of
6 Hendrick's headquarters. And it was an -- an absolute
7 disaster from a conversion standpoint, but not because of
8 the software, not because of the systems, not because of
9 the data conversion, not because of anything like that.

02:15:46

10 There is a process that is very, very
11 important in the service department, which is called
12 "op codes," and op codes are -- they're unique to each
13 dealership. Each dealership has kind of built their own
14 op code structure. And, typically, it's a two-digit or
15 three-digit number and its whole purpose is to save time
16 in typing. When you're opening up a repair order there is
17 a tremendous amount of keystroke work that has to be done,
18 and the op code shortened that dramatically.

02:16:06

19 Well, there had been an initiative inside
20 Hendrick, which had not been accomplished or even
21 attempted, which was to standardized op codes amongst all
22 105 dealerships. And the goal or the reason to do that
23 was, that way, you can move a service adviser from one
24 dealership to another dealership and he would not have to
25 relearn the op codes. Because if you put a service

02:16:45

MIKE NEMELKA - DIRECT BY MR. BOURGET

02:17:03

1 adviser into an environment where there is all new op
2 codes, he is crippled, because he has to look up what
3 every op code is and he has to keep doing that until he
4 has finally memorized, you know, whatever the new set of
5 op codes are from the place he has been transferred to.
6 They wanted to avoid that forever and all time.

02:17:26

7 Unfortunately -- and I don't know the
8 exact -- who talked to who about what, but the upshot was
9 in this that Hendrick decided and CDK let them change the
10 op codes on the day of conversion to the new system. The
11 result was -- It's always been on Monday mornings people
12 always bring their cars in. They kind of have made their
13 to-do list over the weekend, and Day 1 is, you know, you
14 bring your car in to do this or do that. So, there is a
15 lot -- typical Monday morning.

02:17:45

02:18:03

16 The process of opening repair orders was
17 absolutely crippled because there was all new op codes
18 and, you know, the service advisors had to look up every
19 op code, which just, you know, really made it proceed at a
20 snail's pace, which meant that the technicians, who are
21 paid on incentive programs, they did not get work to do
22 until almost noon. And they were not happy about that.
23 They lost half a day's pay. But everybody, I think, had a
24 little bit of, you know, forgiveness built in because,
25 after all, they were converting to a new system and it

02:18:21

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 was -- they expected some things not to go right.

2 The second day it didn't get any better.

3 By noontime, you know, the techs were absolutely up in

4 arms. There was an absolute uprising. And they were

02:18:41

5 saying -- which is absolutely true -- they were top

6 technicians. Some of them had been with Hendrick 25 years

7 or more, and they were just wailing.

8 And, so, the call for help went out to --

9 Mr. Hendrick needed to come and address the group, which

02:18:58

10 he did. And he did a smart thing. He said, 'Guys, I

11 promise you, you are going to make ten percent more this

12 month than you have ever made this year. Be patient with

13 us.' And the techs said, 'Okay. You know, we

14 understand,' you know.

02:19:17

15 And then another interesting thing

16 happened. Success in data conversions has a lot to do

17 with the quality of personnel, the experience with

18 personnel, really. Obviously, there was some real lack of

19 experience because the CDK conversion group should have

02:19:36

20 resisted this idea -- this crazy idea of changing the op

21 codes on the first day of installation.

22 So, Mr. H, as he is called -- he's a very

23 low-key kind of guy and he -- he went around and just kind

24 of went around and talked to folks, you know, after the

02:19:55

25 initial fire had been quenched. And he walked up to a CDK

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 installer and, you know, he talked to him. You know,
2 'Well, how are you? My name is Rick Hendrick.' He shook
3 his hand and -- Rick -- you know, Rick is a hero figure in
4 car racing. He is one of "the" guys.

02:20:14

5 He was talking to this one young person,
6 and, you know, in the course of the conversation he asked
7 him, 'How long have you been with CDK?'

8 And the person answered, 'Well, I am not
9 with CDK. I am a contractor.'

02:20:28

10 'Oh. Really? Okay. How long have you
11 been a contractor?' and so forth.

12 Then he talked with several others, you
13 know, kind of got the same answer. And he realized that
14 he had been promised the best install team and he had not
15 gotten it. And Rick Hendrick is the kind of person -- he
16 is a very simple person. You only would lie to him once.

02:20:41

17 And the next day he called us up and said,
18 'Bob, you know, we've got problems. If you won't punish
19 us, we would like to come back.'

02:21:00

20 And the answer is, obviously, 'Whatever
21 our last proposal is, that's it.'

22 And so they came back.

23 And, you know, that's probably one of the
24 most amazing conversion stories that I have ever heard.

02:21:15

25 And the software -- our software had nothing to do with

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 it. You know, the CDK software had nothing to do with it.
2 There was nothing wrong with the hardware, probably not
3 that much wrong with the people, if they had just not
4 changed op codes.

02:21:34

5 **(Video concluded.)**

6 *********

7 By MR. BOURGET:

8 **Q.** All right. Mr. Nemelka, well, first, what is an op
9 code?

02:21:40

10 **A.** I think Mr. Brockman explained it well. It's a
11 shorthand that service technicians use in the service lane
12 for when people come in and need an oil change or tires
13 changed or some work done on their car. It's a shorthand
14 like a court reporter shorthand so that they don't have to
15 enter all the data. And, as Mr. Brockman said, each
16 dealership, you know, has unique op codes, and Hendrick
17 was trying to make -- have all their dealerships have the
18 same.

02:21:56

19 MR. BOURGET: And just for the record, Your
20 Honor, this -- this clip came from Exhibit 59. Exhibit 59
21 consists of four videos, and this is the fourth video
22 beginning at the nine minute and fifty second mark through
23 the 17 minute second mark.

02:22:10

24 **(Video played.)**

02:22:24

25 BY MR. BOURGET:

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 Q. So, Mr. Nemelka, what was the relevance of what
2 Mr. Brockman was discussing here?

3 A. First, I want to, again, emphasize this was in
4 response to his own lawyer's question. He didn't give
5 those types of long answers to us.

02:22:45

6 And, as I mentioned, it was significant
7 that the largest dealership group tried to change dealer
8 management systems and failed. It shows how hard it is to
9 switch. Mr. Brockman had a clever answer, to say it
10 wasn't because it was so hard to switch, but it was
11 because they did these op codes at the same time. And,
12 so, that was a -- it's a narrative that helps -- I think
13 that he thought helped their story of the case.

02:22:57

14 Q. And so -- you mentioned that the discovery in this
15 case was voluminous. Was document production or retention
16 ever at issue?

02:23:13

17 A. Document production for sure. You always have
18 document production fights in litigation, especially in
19 the MDL.

02:23:25

20 But in terms of retention, one big issue
21 that we had was, frankly, about Reynolds and
22 Mr. Brockman's e-mails. ESI discovery started January
23 1st, 2013, for the case, and Reynolds did not produce any
24 of Mr. Brockman's e-mails before August 26, 2016. So,
25 there were over three-and-a-half years of e-mails missing

02:23:45

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 from Mr. Brockman. And we asked Reynolds in discovery,
2 'Where are they?' And Reynolds came back, and said,
3 'Well, we have done a diligent investigation and we have
4 no information to provide.' So, we were kind of at a
5 loss.

02:24:02

6 And, so, you know, at the deposition -- I
7 did only have three-and-a-half hours. So, at the end I
8 was -- I wanted to ask him a few questions about his
9 e-mail use and -- and document retention.

02:24:18

10 MR. BOURGET: I would like to play a second
11 clip. The first one we marked as 59-A. This one will be
12 58-A. It comes from Exhibit 58. It's the third video
13 contained within Exhibit 58, and it starts at the 1 minute
14 58 mark and goes through the 5 minute 45, the second mark.

02:24:29

15 (Video played.)

16 BY MR. BOURGET:

17 Q. So, Mr. Nemelka, what was the significance of that
18 back-and-forth about e-mail in relation to your case?

19 A. You know, again, the -- we didn't have any e-mails
20 from Mr. Brockman from before August 2016, and we wanted
21 to know what his e-mail use was and what his e-mail
22 preservation practices were. And -- and, so, I only had a
23 few minutes left. That's what I did.

02:28:36

24 MR. BOURGET: All right. I would like to play
25 a third clip. This is from Exhibit 58. We will mark it as

02:28:53

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 58-B. It's the third video in Exhibit 58, and it begins at
2 the 17 second mark and goes to the 1 minute and 57 second
3 mark.

4 (Video played.)

02:30:56

5 BY MR. BOURGET:

6 Q. Mr. Nemelka, so what's the significance here of
7 Mr. Brockman talking about finance managers and the money
8 they bring in every month?

02:31:07

9 A. So, as I said, it's very hard for dealers to switch
10 DMS products. And, here, Mr. Brockman is talking about a
11 product that's -- there's a constellation of products
12 around the DMS that Reynolds offers, and one of them is
13 this docuPAD that dealerships use. And Mr. Brockman is
14 describing how it brings in enough money to a Ford

02:31:26

15 dealership, an added revenue to pay for the DMS and makes
16 the DMS even more sticky for -- for dealerships. And,
17 yeah, that's one reason that Reynolds is such a successful
18 business.

02:31:44

19 Q. "DMS." Does that stand for "dealer management
20 systems"?

21 A. Excuse me. Sorry for using that acronym. Yeah,
22 "DMS" stands for "dealer management system."

23 Q. And what's a dealer management system, very briefly?

02:31:56

24 A. As I said, it's the Enterprise software that a car
25 dealership uses and it's Reynolds's main product. It's

MIKE NEMELKA - DIRECT BY MR. BOURGET

02:32:15

1 CDK's main product. And it is the -- it's, really, the
2 guts of the dealership. It manages accounting, HR,
3 transactional information, inventory information, service
4 information. And it's -- it's kind of the nerve center of
5 the car dealership.

02:32:27

6 And it has that data post -- database
7 component that I referenced. And then my clients are the
8 other third-party applications that need access to that
9 data in order to be able to provide additional services to
10 dealers.

11 **Q.** Did you ever ask Mr. Brockman a question that he
12 seemed unprepared for?

13 **A.** Not many. I mean, he really was very well prepared.

02:32:42

14 There was one where I asked him if he had
15 ever used the phrase "data wars." The conspiracy that we
16 have alleged is that CDK and Reynolds were competing on
17 the basis of their data access policies. And Mr. Brockman
18 had used that phrase "data wars" in a document, and I
19 asked him early on in the deposition if he had ever used
20 that phrase and he said he never had. So, that made me
21 think maybe he had not reviewed that one document where he
22 had used that phrase. But, otherwise, he was -- he was
23 pretty well prepared for the documents and questions I
24 asked.

02:32:59

02:33:15

25 **Q.** And, so, overall, how was his memory of past events?

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 **A.** It was good.

2 Just one thing on that "data wars." He --
3 when I did finally show him the document -- it was in a
4 series of talking points -- he very quickly pivoted to
02:33:30 5 say, 'Oh. I do see I used it once, but it's in lower
6 case. I did it for shorthand. I was speaking to top-
7 level Reynolds executives,' you know, trying to quickly
8 pivot and minimize his description of the competition
9 between CDK and Reynolds as being in a data war, which the
02:33:49 10 reference in the document was that those data wars are now
11 ending as a result of CDK and Reynolds getting together.

12 So, what was your question? I'm sorry.

13 **Q.** How was his overall -- how was his memory of past
14 events?

02:34:04 15 **A.** It was -- it was good. I mean, he had -- he had good
16 recall. I mean, he --

17 I remember asking him about talking points
18 that he had prepared in 2012 for a conversation that he
19 was going to have with Steve Anenen, who is the CEO of
02:34:23 20 CDK; so, the CEO of Reynolds talking to the CEO of CDK.
21 And he prepared these talking points for the phone
22 conversation, and he was able to recall exactly, you know,
23 what those talking points were.

24 I think he even said that, you know, there
02:34:35 25 were certain talking points he didn't get to in the

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 conversation. You know, that was impressive to me.
2 That's a conversation seven years before the deposition
3 that he could recall what he covered and didn't cover.

02:34:51

4 **Q.** And during his testimony did Mr. Brockman ever
5 correct you or another examiner?

6 **A.** There were a few times when I got my facts wrong and
7 he made sure to correct me.

02:35:05

8 One was -- Mr. Brockman acquired Reynolds
9 in 2006, and I thought the month was August, and he
10 corrected me and said it was in October.

02:35:19

11 And then I asked some questions at the
12 start of the deposition about the ownership structure of
13 Reynolds and the Eugene Brockman Trust and how that
14 worked, and I -- I didn't know anything about it. It's
15 not that relevant to our case, but I -- we were curious
16 about the ownership structure of Reynolds, and I asked a
17 few questions, and he was able to correct me on a few
18 points.

02:35:31

19 **MR. BOURGET:** At that point I would like to
20 play -- this is another -- this is a seven-minute clip,
21 what I will mark as 58-C. It's Exhibit 58, the first
22 video, and it starts at the 8 minute 40 second mark through
23 15 minutes and 45 seconds.

02:35:47

24 **(Video played.)**

25 **BY MR. BOURGET:**

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 Q. All right. Mr. Nemelka, you mentioned that the trust
2 wasn't, you know, a central part of the case. So, can you
3 explain what was the significance of asking Mr. Brockman
4 about the trust and the income it distributed?

02:43:07

5 A. I wanted to know the ownership structure of the
6 defendant in our case.

7 Q. Did you -- did you ask Mr. Brockman about the
8 properties that he owned?

9 A. I did.

02:43:22

10 Q. And what was the purpose of asking him those
11 questions?

12 A. In depositions I generally ask witnesses where they
13 own properties in case we ever need personal jurisdiction
14 over them for some reason.

02:43:35

15 MR. BOURGET: All right. Now I would like to
16 play -- this is the fifth clip. It's three minutes long.
17 This will be marked as 58-D. It's Exhibit 58, the first
18 video, and it's at 2 minutes 5 seconds to 5 minutes and
19 1 second.

02:43:47

20 (Video played.)

21 BY MR. BOURGET:

22 Q. All right, Mr. Nemelka. So, you mentioned that you
23 asked him some of the properties for jurisdictional
24 purposes. Why did you ask him about his preparation and
25 the lawyers that were -- that were present?

02:47:01

MIKE NEMELKA - DIRECT BY MR. BOURGET

02:47:16

1 **A.** Again, it's just a list of standard questions that I
2 typically ask at each deposition, if they prepared for
3 their deposition and what they did. There is a litany of
4 topics at the start of the deposition like that that I --
5 that I cover.

6 **Q.** And did you ask Mr. Brockman about the inner workings
7 of Reynolds?

02:47:33

8 **A.** I remember asking him if, as chairman and CEO, he had
9 ultimate decisionmaking authority over the policies and
10 practices of the company, and he said yes.

11 **Q.** Did you ask -- I'm sorry. Go ahead.

12 **A.** I mean, in a way, all my questions were about the
13 inner workings of Reynolds, but, yeah, that was --

02:47:47

14 **Q.** Did you ask Mr. Brockman about the financials of
15 Reynolds?

16 **A.** I don't know if I -- My colleague and I -- Peggy
17 Wedgworth -- divided topics, and I think Peggy Wedgworth
18 on the second day is the one who asked more about the
19 financial aspects of the business.

02:48:02

20 MR. BOURGET: Your Honor, I have one last clip.
21 This comes from Exhibit 59. We will mark it as 59-B. It's
22 the first video of Exhibit 59. It starts at the 1 hour and
23 15 minute and 15 second mark and goes to the 1 hour, 18
24 minute and 55 second mark.

02:48:17

25 THE COURT: Okay.

MIKE NEMELKA - DIRECT BY MR. BOURGET

1 (Video played.)

2 BY MR. BOURGET:

3 Q. Mr. Nemelka, just a few more questions.

4 During Mr. Brockman's deposition, did he
5 ever appear to experience a hallucination?

02:51:31

6 A. No. And I -- just for the Court, these acronyms --
7 "RCI" stands for the "Reynolds's Certified Interface."
8 That's the data access program that Reynolds has.

9 Q. Thank you.

02:51:45

10 And, so, during his deposition did
11 Mr. Brockman ever seem unusually confused?

12 A. No.

13 Q. Did he ever appear to have erroneous or false
14 memories?

02:51:55

15 A. No.

16 Q. And other than today, have you seen Mr. Brockman in
17 person since his deposition?

18 A. Not in person.

19 Q. So, after the deposition concluded, was there
20 anything about Mr. Brockman's behavior that stood out to
21 you?

02:52:09

22 A. Honestly, I just remember him leaving by himself,
23 wearing his suit jacket, carrying a briefcase and car
24 keys, and smiling a little bit and whistling. And he just
25 left on his own, which, for some reason, stuck out in my

02:52:24

MIKE NEMELKA - CROSS BY MR. VARNADO

1 memory.

2 MR. BOURGET: I have nothing further.

3 THE COURT: Cross-examination?

4 MR. VARNADO: Yes, Your Honor.

02:52:35 5 Mr. Thomas, can I get the ELMO, please?

6 THE CASE MANAGER: Sure.

7 MR. VARNADO: Thank you.

8 **CROSS-EXAMINATION**

9 BY MR. VARNADO:

02:52:44 10 **Q.** Good afternoon, Mr. Nemelka.

11 **A.** Good afternoon.

12 **Q.** My name is Jason Varnado. I represent Mr. Brockman.

13 **A.** Nice to meet you.

14 **Q.** Nice to meet you. We have never met each other

02:52:53 15 before other than at lunch I told you you could probably
16 find the government up on the 7th floor.

17 **A.** Thank you for the help. Yes.

18 **Q.** Good. So, you have been a long-time partner at
19 Kellogg Hansen. Correct?

02:53:04 20 **A.** For several years, since -- yes.

21 **Q.** Okay. And prior to rejoining the firm in 2020, you
22 had a role in the Trump administration as the Deputy U.S.
23 Trade Representative; is that right?

24 **A.** Correct.

02:53:15 25 **Q.** I think Mr. Bourget asked you about that.

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

MIKE NEMELKA - CROSS BY MR. VARNADO

1 **A.** Yes.

2 **Q.** And how long did you have that position?

3 **A.** I joined USTR in January. I was nominated for the
4 position and confirmed unanimously by the senate in

02:53:28

5 August. And then I left -- I left in the middle of
6 December, given the change in administrations.

7 **Q.** So, about five months?

8 **A.** Well, I was at USTR for a year but in the senate-
9 confirmed position, yeah.

02:53:41

10 **Q.** Okay. And you got a title, I think Mr. Bourget said,
11 of ambassador?

12 **A.** It does come with the rank of ambassador, yes.

13 That's --

14 **Q.** I think you said your kids are the only ones who
15 really call you that.

02:53:51

16 **A.** That's a stale joke that I use, yes. Only my kids
17 need to call me that, yes.

18 **Q.** So, not something you use professionally today. I
19 don't have to call you "Ambassador Nemelka"?

02:54:02

20 **A.** No. But the government did tell me to make sure I
21 put it on my professional -- not any reason but just
22 respect for the office.

23 **Q.** So, in your bio it does say "Ambassador Nemelka," on
24 your web page?

02:54:14

25 **A.** Correct. And that's -- as I mentioned, that's what

MIKE NEMELKA - CROSS BY MR. VARNADO

1 they recommend we do.

2 Q. Okay. All right. And, so, I think on here also,
3 since we've talked about this litigation, you know, it
4 says that you spearheaded the investigation into the core
5 claims and the antitrust litigation against the two
6 leading providers of dealer management systems, CDK and
7 Reynolds. That's the case that Mr. Bourget has been
8 talking about and the depo that took place almost three
9 years ago. Correct?

10 A. That is the same case, yes.

11 Q. Okay. And you mentioned just a moment ago that you
12 had not seen Mr. Brockman in person since the deposition.
13 Have you seen him in some other capacity?

14 A. I don't think so. I just don't know if I saw him,
15 you know, in a video or something, but I don't think so.

16 Q. Okay. I saw you looking at him a little bit while
17 they were playing the deposition transcripts. Does he
18 look different today than when you saw him three years
19 ago?

20 A. I mean, under the mask? I mean, the eyes and the
21 forehead look similar.

22 Q. Okay. And, now, you have not spoken with
23 Mr. Brockman since you took his deposition. That's fair;
24 correct?

25 A. No, I have not.

MIKE NEMELKA - CROSS BY MR. VARNADO

1 Q. Okay. And, as you sit here today, you have no
2 personal knowledge of Mr. Brockman's current health
3 condition?

02:55:33

4 A. I have no personal knowledge of his current, today,
5 health condition. I did take a deposition of other people
6 who did.

7 Q. Okay. But, sitting right now, were you aware that
8 Mr. Brockman was hospitalized in March of this year with
9 urosepsis and also had delirium?

02:55:46

10 A. You know, we -- I knew that he had health challenges
11 this spring because we saw his deposition in -- There is a
12 private arbitration going on between one of my clients and
13 Reynolds, and we did seek Mr. Brockman's deposition, and
14 the panel comprised of three former federal judges did
15 order his deposition. And I think Reynolds told us at a
16 certain point that he had some health challenges.

02:56:01

17 Q. Okay. And we will talk about that --

18 A. Yeah.

19 Q. -- because you are seeking Mr. Brockman's deposition
20 in your litigation?

02:56:11

21 A. Well, we sought it. The panel ordered it, and
22 Mr. Brockman refused to appear.

23 Q. Yeah. And there's legal arguments as to whether the
24 panel has authority to order him to appear. But, in any
25 event, it's your aim, even as we sit here today, to have

02:56:23

MIKE NEMELKA - CROSS BY MR. VARNADO

1 Mr. Brockman sit for a deposition. Is that correct?

2 **A.** Well, that ship has sailed. He refused. And, so,
3 if -- you know, discovery -- We're now -- we're now
4 preparing for the hearing.

02:56:36

5 **Q.** Is it your testimony you are not still seeking
6 Mr. Brockman's deposition in that litigation?

7 **A.** Not actively, but Reynolds told us that he is not
8 appearing. And, so, we are -- we have moved on.

9 **Q.** Okay.

02:56:49

10 **A.** I mean, if you mean actively seeking, we have no
11 pending motion. We have -- you know, the panel ordered
12 him to appear -- ordered Reynolds to present him for
13 deposition. As -- as a continuing managing agent, the
14 panel held that Mr. Brockman was a -- continues to be a
15 managing agent under the controlling authorities, and,
16 again, that is comprised of three former federal judges,
17 that panel. So, Reynolds had a duty to present him as a
18 managing agent. And, also, the panel held that Reynolds
19 had unclean hands because --

02:57:19

20 **Q.** Look. I understand --

21 **A.** Well, you're asking me about the deposition and --

22 **Q.** I am asking if you are seeking the deposition of
23 Mr. Brockman. I don't want you to get into what the panel
24 found about Reynolds. I am asking if you are asking for
25 him to sit in a deposition in your case that is currently

02:57:31

MIKE NEMELKA - CROSS BY MR. VARNADO

1 pending.

2 **A.** That motion has been decided and we have now -- we
3 have now moved on. If Mr. Brockman voluntarily would sit
4 for a deposition, we would take it.

02:57:42

5 **Q.** Okay. So, before you deposed Mr. Brockman, did you
6 have any personal interaction with him before that
7 deposition?

8 **A.** No.

02:57:51

9 **Q.** Okay. So, you don't have another interaction to
10 compare how he was three years ago with some other point
11 in time?

12 **A.** That was my only personal interaction with him, was
13 the deposition.

02:58:02

14 **Q.** So, you don't have a baseline to know what
15 Mr. Brockman was like prior to your January 2019
16 deposition?

17 **A.** I saw videos, and I watched all I could about him. I
18 watched interviews and things. So, I did have -- I saw
19 him on camera in interviews.

02:58:16

20 **Q.** But you never personally interacted with him.
21 Correct?

22 **A.** Right. I have never personally interacted.

23 **Q.** And you don't have any training or qualifications to
24 diagnose whether somebody has cognitive deficiencies, I
25 take it?

02:58:28

MIKE NEMELKA - CROSS BY MR. VARNADO

1 **A.** I do not.

2 **Q.** You are not a doctor?

3 **A.** Correct.

4 **Q.** All right. You don't have any specialized training
5 in identifying symptoms of Parkinson's?

6 **A.** No, I don't.

7 **Q.** Okay. Or Alzheimer's?

8 **A.** Correct.

9 **Q.** Or dementia?

10 **A.** That's correct.

11 **Q.** So, Mr. Brockman could have exhibited textbook signs
12 of those diseases and you may not have known it, given
13 your lack of training or experience in this area?

14 **A.** I mean, as a layperson, I -- I know. I could, you
15 know, perceive things. But, as an expert, I wouldn't know
16 what the, you know, expert signs are.

17 **Q.** Did you perceive any signs of Parkinson's in
18 Mr. Brockman when you were deposing him in January of
19 2019?

20 **A.** As a layperson, not that I was aware of. No.

21 **Q.** Okay. So, are you aware that the government's expert
22 had said that they observed signs of Parkinson's in the
23 deposition from January of 2019?

24 **A.** No, I am not.

25 **Q.** Now, you talked with the government on a few

MIKE NEMELKA - CROSS BY MR. VARNADO

1 occasions. You've sat -- at least prior to even last
2 night. I think you said you had a meeting with
3 Mr. Bourget and one of the agents last night?

02:59:40

4 **A.** What I said was I had a series of phone calls, and
5 then last night I met with Evan and Boris.

6 **Q.** And I believe in your discussion with the IRS and the
7 agents and the prosecutor you explained that the
8 deposition, as we saw in the video, covered documents and
9 events from ten years or more ago. Correct?

02:59:56

10 **A.** I think one of the earliest documents I showed
11 Mr. Brockman was from 2007. So, yeah, you know, went back
12 12 years.

13 **Q.** Are you aware that dementia patients can retain
14 long-term memory as opposed to even short-term memory?

03:00:11

15 MR. BOURGET: Objection, Your Honor. There is
16 nothing here to report --

17 THE COURT REPORTER: I can barely hear you.

18 THE COURT: I mean, I guess my question -- and
19 I sustain the objection. This witness has not been

03:00:23

20 qualified as a medical expert. I think he will admit he
21 has got no expertise in diagnosing anybody with Parkinson's
22 or Alzheimer's. I mean, do you have any sort of medical
23 training?

24 THE WITNESS: No.

03:00:35

25 THE COURT: Can you identify the symptoms of

MIKE NEMELKA - CROSS BY MR. VARNADO

1 Parkinson's or Alzheimer's?

2 THE WITNESS: Other than -- no, I can't.

3 THE COURT: Then, I'm just trying to figure out
4 why we are asking these questions.

03:00:46

5 MR. VARNADO: Well, he was -- made statements
6 in response to the government's question that they were
7 covering events back from 2012 and the testimony that will
8 be relevant in this case that long-term memory for dementia
9 patients might not be impacted at all. That was the

03:00:59

10 question.

11 THE COURT: You can ask him that. But whether
12 or not that's consistent or not consistent with Alzheimer's
13 he doesn't know. I mean -- so, I -- so, the objection is
14 sustained.

03:01:07

15 You can ask him the basic question about
16 what he knows and what he doesn't know. But with respect
17 to medical diagnosis, I sustain the objection.

18 BY MR. VARNADO:

19 Q. Okay. Fair to say that Mr. Brockman was conversant
20 with Reynolds' business when you deposed him?

03:01:17

21 A. He was very conversant, yes.

22 Q. Right. And even for events that had taken place long
23 ago with respect to Reynolds, he knows his stuff cold,
24 backwards and forwards?

03:01:29

25 A. Again, he was very well prepared and very conversant

MIKE NEMELKA - CROSS BY MR. VARNADO

1 about the issues in the case and the documents.

2 Q. And I think you said he was deposed for two half
3 days. Correct?

03:01:42

4 A. On the record, they were three and a half hours, but,
5 you know, we took lunch, and I think each day ended, you
6 know, mid-afternoon. And then on the second day his
7 counsel did quite a bit of redirect. So, that one went
8 most of the day.

03:01:54

9 Q. Okay. And I think you said your colleague Peggy was
10 doing the examination the second day. But were you
11 present for both days?

12 A. I was.

13 Q. And I believe you said that the deposition was broken
14 up that way because of Mr. Brockman's health condition?

03:02:06

15 A. That was an accommodation they requested because of a
16 heart condition that they said he had, and we -- we, of
17 course, agreed to that.

18 Q. And you don't dispute that he had atrial fibrillation
19 and that was a necessary accommodation?

03:02:18

20 MR. BOURGET: Objection, Your Honor. The same
21 objection.

22 THE COURT: Yeah. Do you have any knowledge of
23 Mr. Brockman's medical diagnoses or conditions during that
24 time?

03:02:28

25 THE WITNESS: No. We just accepted what his

MIKE NEMELKA - CROSS BY MR. VARNADO

1 lawyers told us.

2 THE COURT: So, you can ask him what he knows,
3 but he says he has no personal knowledge of it.

4 MR. VARNADO: And that's all I was asking,
5 Judge, to confirm that he is not disputing that and there
6 was a reason for the deposition being broken up into two
7 days. That was it.

8 BY MR. VARNADO:

9 Q. So, in the litigation against Reynolds and CDK, is
10 your firm working on an hourly or contingency basis?

11 A. Both.

12 Q. Okay. And how long has that litigation been ongoing?

13 A. The first lawsuit was filed in January of 2017.

14 Q. And have you or your firm tried to get -- tried to

15 get any state attorneys general active to either
16 participate in that litigation or start an investigation?

17 A. We were asked by states attorney generals for a
18 meeting. I personally -- I don't think my firm had a
19 role. We went to the meeting. I don't -- my -- not that

20 I recall that my firm spearheaded those conversations,
21 or -- or, you know, lobbied.

22 Q. Okay. The same question with the Federal Trade
23 Commission. Did you or your firm try to lobby or initiate
24 an investigation with the FTC?

25 A. The FTC is investigating this antitrust case, and we

MIKE NEMELKA - CROSS BY MR. VARNADO

1 have gone in for series of meetings that -- you know,
2 where -- where I have represented clients who have gone in
3 and given factual information pursuant to the FTC's
4 request. And, so, I have been in with the FTC before as
5 part of their investigation.

03:04:12

6 **Q.** Okay. And I think you mentioned something about
7 sanctions that would be potentially sought. That's in
8 connection with an arbitration, not in the MDL. Correct?

9 **A.** I don't know if I mentioned sanctions. We -- So,
10 what's your question?

03:04:25

11 **Q.** Yeah. That, you know, there is an arbitration that
12 is separate and apart from the case that is pending inside
13 the federal court in the MDL.

14 **A.** In the arbitration we represent a company called Cox
15 Automotive --

03:04:37

16 **Q.** Right.

17 **A.** -- against Reynolds, and then in the MDL we represent
18 other clients against Reynolds and CDK.

19 **Q.** And then I think you mentioned the sort of bad faith
20 finding, but that's in connection with the arbitration,
21 not in the MDL case. So, that's in relation to the Cox
22 Automotive case?

03:04:44

23 **A.** Well, we have filed a sanctions motion in the MDL.

24 **Q.** But nothing has been ruled on yet?

25 **A.** That has not been ruled on.

03:04:57

MIKE NEMELKA - CROSS BY MR. VARNADO

1 Q. And --

2 A. That had nothing to do with Mr. Brockman's
3 deposition.

4 Q. Right. It didn't.

03:05:04

5 And, so, if -- I think it's fair to say,
6 if Mr. Brockman is found not competent, you definitely
7 will not be able to take his deposition in your
8 litigation. Correct?

03:05:20

9 A. I don't -- I don't know. Probably, yeah. But,
10 again, that -- that ship has sailed. The panel ordered
11 it. He didn't appear. And now we -- discovery is over.

12 Q. Yeah. So, the answer is you won't get a deposition
13 in that case?

03:05:32

14 A. We are not counting on a deposition from him in that
15 case.

16 MR. VARNADO: Okay. No further questions.

17 THE COURT: Redirect?

18 MR. BOURGET: Nothing further.

03:05:39

19 THE COURT: Okay. Mr. Nemelka, you are
20 released.

21 MR. BOURGET: Yes, Your Honor.

22 THE COURT: Sir, thank you. I appreciate it,
23 sir.

03:05:46

24 THE WITNESS: Thank you, Your Honor. It was a
25 privilege to be here.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 THE COURT: And safe travels.

2 THE WITNESS: Thank you very much. I
3 appreciate it.

4 THE COURT: Thank you.

03:06:06 5 Are we ready to recall the previous
6 witness?

7 MR. LOONAM: Yeah.

8 THE COURT: Okay. Doctor, you are still under
9 oath and we are just continuing your examination.

03:06:24 10 THE WITNESS: Yes, sir. Thank you.

11 THE COURT: And you may proceed whenever you
12 are ready.

13 MR. LOONAM: Whenever he is settled in, Your
14 Honor.

03:06:51 15 **ROBERT DENNEY, Ph.D.,**
16 previously sworn, resumed the stand and testified as
17 follows:

18 **CROSS-EXAMINATION**

19 BY MR. LOONAM:

03:06:56 20 **Q.** Good afternoon.

21 **A.** Good afternoon.

22 **Q.** Dr. Denney, you have testified in a lot of cases.
23 Correct?

24 **A.** Yes.

03:07:04 25 **Q.** And fair to say sometimes the courts rule for the

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 party you're testifying for and sometimes the courts rule
2 against you?

3 **A.** Yeah. The courts will decide what the court is
4 obligated to decide.

03:07:21

5 **Q.** Yeah. And -- but other times courts have gone
6 further and specifically found your testimony in federal
7 court not credible. Correct?

03:07:47

8 **A.** Well, sure. Each judge decides how credible each
9 witness is, and they weigh that credibility against
10 others. Sure.

03:08:09

11 **Q.** Sure. So -- but to be clear, there are times where
12 you will testify on behalf of a party and the court will
13 rule for the adversary. That is not what I am referring
14 to. So, that happens. But what I'm referring to -- and
15 let us know if you recall this -- there are other times
16 where courts have gone further than simply ruling for the
17 adversary, but have specifically found your testimony in
18 federal court not credible. They have made an adverse
19 credibility finding with respect to you. Do you recall
20 that?

03:08:28

21 **A.** Certainly. And I recall courts finding my testimony
22 more credible than other experts. It depends on the
23 situation.

03:08:40

24 **Q.** Okay. Well, perhaps you could cover that on
25 redirect. Please listen to my question, sir.

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 So -- well, do you keep a -- a list of
2 times where courts specifically have made an adverse
3 credibility finding against you?

4 **A.** Not specifically, no.

03:09:00

5 **Q.** So, you keep a list of the times where you find a
6 defendant competent or not competent. Correct?

7 **A.** Well, I did when I was in the Bureau of Prisons. Now
8 I just keep a list of my testimony, each case that I
9 testify in, in case I am called to present a list of
10 cases.

03:09:23

11 **Q.** Okay. So how long have you been out of the Bureau of
12 Prisons?

13 **A.** Since 2011.

03:09:30

14 **Q.** Okay. So, the percentages that you testified to on
15 direct, with respect to the percentage of people that you
16 find competent, is from 2011?

17 **A.** Yes. And I -- looking back on cases since then, I
18 don't see any significant difference, but I haven't kept
19 track of it. No.

03:09:48

20 **Q.** Okay. And you don't keep track of instances where
21 federal judges make a specific adverse credibility finding
22 against you?

23 **A.** Sometimes I hear about it, but, no, I don't look
24 up -- I don't look them up to try to figure out whether I
25 was liked more or less than a different expert.

03:10:03

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

03:10:19

1 Q. How many times -- I want to be clear, sir. I want
2 to -- I want to be clear. I am not talking about sort of
3 a battle of the experts, where the judge says, you know,
4 Considering the totality of the evidence, you know, I am
5 going to rule for the other side. That's not what I am
6 talking about. Okay? Do you understand that?

7 A. Yes. No. They have to rule on the credibility of
8 the witness.

03:10:33

9 Q. What I am talking about is where the court
10 specifically says, 'I find Dr. Denney not credible.' Do
11 you recall instances where that's occurred?

12 A. I can recall one case where a judge used a phrase
13 like that.

14 Q. Okay. What case is that?

03:10:48

15 A. It was out of Brooklyn.

16 Q. Is that the *Ronell Wilson* case?

17 A. It was *Ronell Wilson 2*. The prior decision from the
18 court was that my testimony was very credible.

19 Q. Judge Garaufis?

03:11:05

20 A. Yes.

21 Q. Well -- and that's the one instance you remember
22 where a judge specifically found you not credible?

23 A. Yes.

24 Q. You don't recall any others?

03:11:18

25 A. No. Not off the top of my head.

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. You testified in a case of *Webster v. Lockett* in
2 2019. Correct?

3 A. *Webster v. Lockett*. That's familiar, but I can't
4 specifically place it.

03:11:37 5 Q. Did you ever testify in *Terre Haute*?

6 A. Yeah. In -- on the Indiana case, sure. Yeah. Okay.

7 Q. Do you recall the case now?

8 A. I remember *Webster*, yes.

03:11:50 9 Q. You do? It's -- it's 2019, two years ago. It was a
10 death penalty case. Right?

11 A. Yes, it is. Right.

12 Q. And do you recall that case now?

13 A. Yes, I do.

03:12:03 14 Q. And you testified in that case that the petitioner
15 was malingering in intellectual disability. Correct?

16 A. Yes.

03:12:20 17 Q. And you testified that you found malingering in part
18 because the petitioner's test scores differed from your
19 observations of the defendant's real-world functioning.
20 Correct?

21 A. In part, yes.

22 Q. And that was an exercise of your clinical judgment in
23 that case. Correct?

24 A. Yes.

03:12:30 25 Q. And in that case you focused on evidence that

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 supported your conclusions while ignoring, disregarding or
2 minimizing evidence that called your conclusions into
3 question. Correct?

03:12:43

4 **A.** That was the judge's opinion. That was not my
5 opinion.

6 **Q.** But that's -- but that's what happened. Correct?

7 **A.** That's what the judge wrote in the decision, yes.

8 MR. LOONAM: Mark this as 53.

9 BY MR. LOONAM:

03:13:10

10 **Q.** This is the -- the case *Webster v. Lockett*. Can you
11 see it on the screen?

12 **A.** Yes, I can.

13 **Q.** Turn to Page 11. So, I'll start at -- Can you see
14 it?

03:13:34

15 MR. LOONAM: Your Honor, can you read that or
16 not?

17 THE COURT: I can read it.

18 MR. LOONAM: Okay.

19 BY MR. LOONAM:

03:13:39

20 **Q.** On Footnote 13 it says: "The Court finds the
21 testimony of Dr. Denney, a licensed clinical psychologist
22 who is board certified in clinical neuropsychology and
23 forensic psychology, overall to be not credible and, thus,
24 gives little or no weight" -- "give it little or no

03:14:01

25 weight. As a whole, Dr. Denney focused on evidence that

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 supported his conclusions while ignoring, disregarding or
2 minimizing evidence that called his conclusions into
3 question."

03:14:20

4 So, this opinion came down in 2019. When
5 did you learn about it?

6 **A.** When did I learn about the opinion?

7 **Q.** Yes.

8 **A.** Oh. Sometime shortly thereafter. I don't know when.

03:14:37

9 **Q.** And to be clear, we have -- we have met before,
10 haven't we?

11 **A.** Well, we met at Jones Day, but I also feel like I had
12 some interaction with you previously when you were an
13 assistant U.S. attorney, but I can't place it.

14 **Q.** Where was I an assistant U.S. attorney?

03:14:53

15 **A.** Well, I was thinking New York.

16 **Q.** In the Eastern District of New York. Correct?

17 **A.** I think so, but I don't know for sure.

03:15:06

18 **Q.** When we met at Jones Day, we discussed the *Ronell*
19 *Wilson* case, didn't we? We discussed the fact that you
20 worked with Jim McGovern?

21 **A.** Yeah, I don't remember that. I -- I don't remember
22 you saying that.

23 **Q.** You don't remember us, when we were connected and we
24 talked about --

03:15:13

25 **A.** Oh, I remember that conversation, but I don't

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 remember the content about *Ronell Wilson* coming up.

2 Q. Do you remember us talking about Jim McGovern?

3 A. I think so.

4 Q. And you don't remember the context of us talking

03:15:25

5 about Jim McGovern was in the context of the fact that you
6 had worked on the *Ronell Wilson* case?

7 A. Well, I know -- I know that I worked with Jim

8 McGovern in the *Ronell Wilson* case, but I don't remember

9 us talking about the *Ronell Wilson* case. Because I was

03:15:39

10 thinking about that you were involved in a *Pena* case with
11 me in New York. That's what I remember asking you about.

12 Q. All right. Well -- well, I am not going to testify

13 here, although I may have to, Your Honor, apparently.

14 So --

03:16:01

15 MR. SMITH: I've got to object to that comment
16 and move to strike it.

17 MR. LOONAM: Well, we can have a sidebar and I

18 can tell you.

19 THE COURT: Here is the deal. If you decide to

03:16:10

20 testify, then somebody else is going to have to take the
21 witness because you will become a fact witness in the case.

22 MR. LOONAM: Then, we'll let that go.

23 THE COURT: That is just the way it is. So,

24 either you are going to testify and then have Mr. Varnado

03:16:24

25 or someone else take the witness or you're not.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 MR. LOONAM: Okay, Your Honor.

2 BY MR LOONAM:

03:16:38

3 Q. So, you remembered I was an AUSA in New York. You
4 remember we talked about Jim McGovern, who was the
5 prosecutor on the *Ronell Wilson* case. Correct?

6 A. Yes, he was.

03:16:50

7 Q. And, so, when I asked you about any adverse
8 credibility findings that had been made against you, you
9 had suggested -- you remembered -- the one case you
10 remembered was the *Ronell Wilson* case. Correct?

11 A. Yes. I remember Judge Garaufis deciding the way he
12 did. Sure.

13 THE COURT: Before we go on, can I just have a
14 copy of the opinion?

03:17:02

15 MR. LOONAM: Sure. Of course, Your Honor.

16 THE COURT: I'm sorry. I am not -- I can't
17 find it. Just hand it to my law clerk.

18 MR. LOONAM: Yes, sir.

03:17:17

19 THE COURT: I'm sorry. I didn't mean to
20 interrupt.

21 MR. LOONAM: Not at all, Your Honor.

22 BY MR. LOONAM:

03:17:29

23 Q. And above, at Paragraph 11 -- at Footnote 11, the
24 Court wrote that "the government argues that the validity
25 tests indicated that Webster was malingering.

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03:17:51

1 Specifically, the government points to the testimony of
2 Dr. Denney that Webster failed the Word Memory Test (WMT)
3 and that Webster's results on the Medical Symptom Validity
4 Test (MSVT) also showed that Webster was malingering. For
5 the reasons explained below the Court gives Dr. Denney's
6 testimony little weight."

7 Those are two of the freestanding validity
8 tests that you testified about earlier today. Correct?

9 **A.** Yes.

03:18:06

10 **Q.** And you -- Okay. So -- and, as you sit here, the
11 only two cases you recall where there has been an adverse
12 credibility finding made against you is the *Ronell Wilson*
13 case in the EDNY where Judge Garaufis wrote an opinion,
14 and the -- the *Lockett* case. Do you recall any other
15 cases?

03:18:44

16 **A.** Not off the top of my head, no.

17 MR. LOONAM: I have to reserve on that, Your
18 Honor.

19 BY MR. LOONAM:

03:18:53

20 **Q.** And to be clear, sometimes in competency proceedings
21 the record is sealed. Correct?

22 **A.** Yes. I believe so.

23 **Q.** Yeah. And sometimes the testimony and transcripts
24 are sealed. Correct?

03:19:13

25 **A.** Yes.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. And even sometimes judges' orders are sealed in
2 competency proceedings. Correct?

3 A. I believe so.

03:19:26

4 Q. And, so, without telling me the specific case, then,
5 are you aware of any sealed proceedings that -- where the
6 judge has made an adverse credibility finding against you?

7 A. Not that I can think of. Not that I can recall.

8 Q. You discussed your educational background on direct
9 yesterday. Do you recall that?

03:19:57

10 A. Yes.

11 Q. And you described how you received your undergraduate
12 degree in youth ministry. Correct?

13 A. Yes.

14 Q. And that was from the Lutheran Bible Institute?

03:20:12

15 A. Correct.

16 Q. Does -- and does the school -- does that school still
17 exist?

18 A. They changed their name to "Trinity College," and I
19 am unsure if they still exist. They moved to a different
20 location in Washington state, and I haven't followed it.

03:20:24

21 Q. Yeah. So, you are not sure if they exist anymore?

22 A. Correct.

23 Q. Okay. And in -- Yeah. And then you testified about
24 how you obtained your master's and doctor of psychology

03:20:46

25 degrees. And I know you discussed that you worked at the

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Forest Institute, but where did you obtain your master's
2 and your doctor of psychology degrees?

3 **A.** At the Forest Institute of Professional Psychology.

03:21:04

4 **Q.** And did the Forest Institute have any other programs
5 of study other than the master's of psychology and doctor
6 of psychology degrees that you obtained?

03:21:31

7 **A.** Well, at one period of time, they had -- more
8 recently, they had a -- I think they had other master's
9 degrees for a while. I think they may have had a -- an
10 applied behavior analysis program.

11 **Q.** While you were there?

12 **A.** When I was teaching later on, not when I was a
13 student.

03:21:43

14 **Q.** When you attended the Forest Institute as a student,
15 did they have any other programs of study other than the
16 master's of psychology degree that you obtained, and the
17 doctor of psychology degree that you obtained?

18 **A.** No. It was a school focused strictly on professional
19 psychology.

03:21:55

20 **Q.** And just those two degrees. So, they didn't have a
21 biology department? They didn't have an English
22 department. Correct?

23 **A.** Correct. It wasn't a university. It was an
24 institute.

03:22:04

25 **Q.** And you received your master's in psychology from the

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Forest Institute in 1989. Correct?

2 **A.** Yes.

3 **Q.** You came from the -- the -- the ministry background.

4 Did you have to take any courses or -- or -- before

03:22:27

5 applying to the Forest Institute? Did they have, like,
6 requirements? Like, did you need a psychology degree in
7 order to apply?

8 **A.** No. But I had to have a certain number of psychology
9 undergraduate courses, and I had to take some extra ones

03:22:41

10 on the side when I first started the program, to catch
11 that up.

12 **Q.** And did you need to take, like, a standardized test,
13 the GRE, or anything, to get into the Forest Institute?

14 **A.** At that time they did not require a GRE, no.

03:22:55

15 **Q.** Okay. Or any other standardized test? Right? Like
16 the GMAT or something?

17 **A.** Well, no. That would be the -- for a graduate
18 program in clinical psychology, it would be the GRE.
19 That's the only test that they would use.

03:23:07

20 **Q.** And they didn't require it?

21 **A.** Correct.

22 **Q.** Okay. And then two years after you obtained your
23 masters in 1991, you received a doctor of psychology
24 degree. Correct?

03:23:23

25 **A.** Yes.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. And people refer to that as a "PsyD"?

2 A. PsyD. That's correct.

3 Q. PsyD. And at the time you graduated from the Forest
4 Institute, it was not accredited by the American
5 Psychological Association, or APA, at that time. Correct?

03:23:43

6 A. That is correct. They became accredited three years
7 later.

8 Q. Okay. They became accredited three years later. So,
9 they weren't accredited when you graduated, but they
10 became accredited three years later.

03:23:59

11 And an APA accreditation for a PsyD
12 program is important. Correct?

13 A. Yes, it is. It is very helpful.

14 Q. In fact, I think on your CV, for your time at the
15 Forest Institute, when you were a director of one of the
16 programs, you note that it was an APA-certified program.
17 Correct?

03:24:23

18 A. Yes.

19 Q. And what -- what -- you were the director of the
20 Forest Institute's neuropsychology group; is that right?

03:24:42

21 A. Well, initially, I was made -- First of all, I taught
22 there as a professor from about 1996 or '7 through 2016
23 and reaching the rank of full professor. And, initially,
24 I was teaching neuroanatomy, which I taught all the way
25 through, but then I -- I was teaching forensic psychology

03:25:11

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

03:26:23

1 courses for the first three or four -- well, first five
2 years maybe, and then it switched over to neuropsychology
3 once I had my board certification in clinical
4 neuropsychology. They have a specialization track that
5 was in clinical neuropsychology.

6 Q. And I didn't mean any disrespect by going to the
7 binder. I was listening the whole time. I just didn't
8 want to waste time looking for documents.

9 THE COURT: That's okay.

03:26:24

10 MR. LOONAM: Thank you, sir.

11 BY MR. LOONAM:

12 Q. And, so, you started teaching there in -- in 1996.
13 Right?

14 A. Or '97. I don't recall exactly.

03:26:24

15 Q. I just checked it. Perhaps.

16 And, so, then you became the director of
17 neuropsychology when?

18 THE COURT: Counsel, I'm sorry. We're going to
19 have to take a break right now.

03:26:24

20 MR. LOONAM: Sure.

21 THE COURT: Let's go ahead and take -- Has 15
22 minutes been working for all of you? Is that pretty --
23 because -- the only reason why I am kind of keeping to a
24 close time schedule is because I understand you guys have
25 doctors involved, and I'm trying to get everyone through so

03:26:24

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 we can get doctors on their way. But if that works for
2 everyone, let's do 15 minutes.

3 MR. LOONAM: Judge, we're very grateful.

4 THE COURT: Okay. Not a problem. Let's go
5 ahead. We will be back at 20 till.

03:26:33

6 THE CASE MANAGER: All rise.

7 (Break taken from 3:26 to 3:59.)

8 THE CASE MANAGER: All rise.

9 THE COURT: Please be seated, everyone.

03:59:30

10 Sorry to keep you waiting, counsel. We
11 just had a couple things we needed to take care of.

12 MR. LOONAM: Your Honor, please. Thank you.

13 THE COURT: You may continue when ready.

14 MR. LOONAM: Thank you, sir.

03:59:39

15 Oh, this just restarted.

16 BY MR. LOONAM:

17 Q. Dr. Denney, a few moments ago, in discussing your
18 educational background, I asked you if your -- the school
19 where you obtained your youth ministry degree still
20 existed. And -- Do you recall that?

04:00:05

21 A. Yes.

22 Q. And you testified that it changed its name to
23 "Trinity College." It moved, but you weren't sure if it
24 still existed. You didn't remember. Do you recall that?

04:00:24

25 A. Correct.

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. All right. Do you recall testifying in a case called
2 *United States v. Seth*?

3 A. Seth? Seth?

4 Q. Markell Seth.

04:00:37

5 A. Yes.

6 MR. LOONAM: What number am I up to? 54? I
7 will mark this Defendant's 55 just for identification.

8 BY MR. LOONAM:

9 Q. Are you able to see that?

04:01:06

10 A. Yes, I can.

11 Q. I am going to turn to what is Page 360 of the
12 testimony.

13 And the question to you was: "I see that
14 you did your B.A. at the Lutheran Bible Institute of
15 Seattle.

04:01:34

16 "Answer: Yes.

17 "Question: Is that right? Is that
18 accredited?

19 "Answer: Oh, it was. They just
20 actually -- they changed their name to 'Trinity Lutheran
21 College' and then just as of two weeks ago closed their
22 doors, sadly.

04:01:44

23 "Question: The Lutheran Bible Institute
24 closed their doors or Trinity?

04:02:03

25 "Well, the Lutheran Bible Institute of

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Seattle changed its name to 'Trinity Lutheran College,'
2 moved to Everett, and then maintained a college there for
3 a number of years and have just recently shut their
4 doors."

04:02:22

5 So, as of May 17th, 2016, you recalled
6 that your alma mater no longer existed. Correct?

7 **A.** Yes. That's what I testified to in 2016.

8 **Q.** And then you -- between 2016 and today you had
9 forgotten that your alma mater no longer existed?

04:02:51

10 **A.** No. Not exactly. I think I was wrong then when I
11 believed they had shut their doors. I continued to get
12 mailings talking about the foundation that they're
13 running, and it appears to me they're still running
14 students through the program. So, that's why I say I am
15 not really sure if it is or not. I -- back then, I
16 believed they had closed their doors. Since that time
17 additional information came out to me in mailings, as an
18 alumni, that suggests they're still running some students
19 in there in a different capacity.

04:03:10

20 **Q.** Okay. So -- so, you -- so, then, you believe that it
21 is up and running and they are running students through
22 there in some capacity?

04:03:31

23 **A.** I'm not sure. Yeah, exactly. I'm not sure. I
24 believe that it looks like they are. I'm just not sure.

04:03:50

25 I haven't followed up with that. That's what the

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 paperwork I have received suggested to me, yes.

2 **Q.** Going back to the Forest Institute where you obtained
3 your masters in PsyD, APA accreditation for a PsyD program
4 is important, correct?

04:04:10

5 **A.** Yes.

6 **Q.** Completion of an APA-accredited PsyD program is one
7 of the necessary conditions to receive an APA-accredited
8 internship; is that right?

04:04:29

9 **A.** No, actually not. My internship at the U.S. Medical
10 Center was an APA-accredited internship.

11 **Q.** And -- well, did you need to take -- obtain some
12 exemption or have some delay while you waited for your
13 licensing to come through as a result of being an
14 unaccredited school?

04:04:53

15 **A.** First of all, no. Second of all, it wasn't
16 unaccredited.

17 **Q.** You went on to become director of the Forest
18 Institute's neuropsychology PsyD program. Correct?

19 **A.** Well, I wasn't a director of the PsyD program.

04:05:15

20 Within the PsyD program they had specialty concentrations,
21 which would be a series of courses as well as practicum
22 experiences in that specialty area, and it was called a
23 "concentration," and I directed the neuropsychology
24 concentration.

04:05:31

25 **Q.** Okay. So, you directed -- in the PsyD program, what

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 other concentrations were there?

2 **A.** Well, they had a marriage and family therapy
3 concentration. They had a forensic psychology
4 concentration. They had -- during the latter years they
04:05:58 5 had a -- as I mentioned -- what do you call -- behavior --
6 associative -- some sort of behavioral analysis
7 concentration. I think for a period of time there might
8 have been a police-oriented, sort of an aspect of a -- of
9 the forensic concentration that was geared towards police-
04:06:22 10 related psychology work. That's all I can remember at
11 this point.

12 **Q.** Yeah.

13 **A.** And there were some.

14 **Q.** Fair enough. And what years were you the director of
04:06:34 15 the neuropsychology concentration?

16 **A.** Well, as I said, I started as the director of the
17 forensic psychology concentration, but then it switched
18 over to -- I was asked by the president to switch over to
19 neuropsychology, and I -- I don't remember if that was in
04:06:53 20 2000 or 2003. It corresponded with my obtaining a board
21 certification in neuropsychology. And I have had two
22 different board certifications in neuropsychology, one I
23 had in 2000 that I have given up and let go. The other I
24 obtained in 2003. So, I am not sure when it started.

04:07:15 25 **Q.** And then how long were you a director of a

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 concentration at the Forest Institute?

2 **A.** Until the school closed its doors in, I believe it
3 was, 2016. I -- that's my recollection.

4 **Q.** Okay.

04:07:29

5 **A.** It's on my CV.

04:07:52

6 **Q.** Well, during that -- that time while you were at the
7 Forest Institute and the director of concentrations, were
8 you aware that the -- the APA either suspended or put
9 Forest's accreditation on probation from approximately
10 2010 to 2013?

11 **A.** Yes. It was on probation for a while. I don't
12 remember how long it was. And I remember that it obtained
13 its full accreditation back before they closed the doors.

04:08:09

14 **Q.** So -- well, do you think it was -- it was on
15 probation -- and it was on probation because it wasn't in
16 compliance with the standards of the APA?

17 **A.** Well, they -- that -- they were -- there were
18 recommendations that the school needed to change some
19 things and that's why.

04:08:20

20 **Q.** And that's while you were a director there?

21 **A.** While I was the director of neuropsychology
22 concentration, yes.

23 **Q.** And you just testified that the Forest Institute no
24 longer exists -- exists. Correct?

04:08:36

25 **A.** That's correct.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. And if I -- it closed its doors in approximately
2 2015. Does that sound right?

04:08:52

3 A. It might have been 2015. As I said, I can't
4 remember. I said 2016. But it's in my CV. I don't
5 remember.

6 Q. Yeah. No. No. That's -- I'm just clarifying the
7 record. That's all.

8 A. That's okay.

04:09:03

9 Q. And, so, was obtaining your board certification --
10 did you have to take any additional steps because, when
11 you graduated Forest Institute, was it APA-accredited?

12 A. Additional steps that are out of the ordinary for
13 anybody going through the board-certification process? Is
14 that what you're asking?

04:09:19

15 Q. Yes.

16 A. No.

17 Q. Did you have to obtain a certificate of professional
18 qualification?

19 A. No. I don't even know what that is.

04:09:33

20 Q. Is it correct that the field of psychology has lagged
21 behind other fields in adopting board certification
22 standards?

23 A. Professional psychology in general?

24 Q. Yes.

04:09:51

25 A. Is that what you asked? As far as -- in terms of its

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

04:10:11

1 comparison to medicine, yes. Medicine is further advanced
2 in the process of developing board certifications. They
3 have been doing it longer. But I believe the American
4 Board of Professional Psychology was started in the '50s
5 or -- I can't remember what date it started, but it was a
6 long, long time ago.

04:10:30

7 **Q.** Yeah. And, so, in -- in the field -- the field of
8 psychology, generally, there may be, very likely, many
9 people who are qualified for board certification who don't
10 seek it out. Is that fair?

04:10:46

11 **A.** Oh, that is fair. Yeah. And that is an interesting
12 difference between medicine and psychology, professional
13 psychology, is that in medicine it's pretty much required
14 that you have to go through a board certification process.

04:11:02

15 And that has not been the case in psychology. And, so,
16 there are a lot of professional psychologists that do not
17 pursue board certification. However, in recent years, in
18 certain specialties more than others -- and
19 neuropsychology being one of them -- hospitals are
20 starting to demand that that be done. So, it is lagging
21 behind, certainly. Hopefully, it will catch up.

22 **Q.** And you worked with Dr. Dietz in this case?

23 **A.** Yes. Yes.

24 **Q.** And is he board-certified?

04:11:18

25 **A.** I -- I believe so.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. And --

2 A. I know he's -- well, I presumed he was. I thought he
3 was.

04:11:37

4 Q. Yeah. My next question is: What is the basis of
5 your understanding? Is it just an assumption or do you
6 have a reason that you believe that?

04:11:55

7 A. I believe -- I guess I can't tell you where I got
8 this from. I don't know. I believe that he's board-
9 certified in psychiatry with special -- specialty
10 qualifications in forensic psychiatry.

11 Q. Now, you agree that Mr. Brockman suffers from
12 Parkinson's disease. Correct?

13 A. Yes.

04:12:14

14 Q. And are -- do you consider yourself an expert in
15 Parkinson's disease?

16 A. Not -- not uniquely specifically so. I am an expert
17 in neuroanatomy and neuropathology due to my teaching and
18 my publications and clinical work, but I have not
19 specifically published anything in Parkinson's per se.

04:12:41

20 Q. I --

21 A. But I taught on Parkinson's. I taught graduate
22 students about Parkinson's disease and its characteristics
23 and how it progresses, yes.

04:12:52

24 Q. Have you ever clinically treated someone for
25 Parkinson's disease?

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1 **A.** I have evaluated and been part of the care of people
2 with Parkinson's disease, yes.

3 **Q.** So, do you consider yourself an expert in Parkinson's
4 disease?

04:12:59

5 **A.** Well, I guess it depends on how you define
6 yourself -- how you are defining an expert.

04:13:15

7 I believe that in the Federal Rules of
8 Evidence characteristics I probably meet that definition
9 for an expert, yes; but I wouldn't say that I have got
10 some special super duper qualifications in Parkinson's.

11 **Q.** Okay. You testified on direct about memory and
12 Parkinson's. Do you recall that?

13 **A.** Yes.

04:13:51

14 **Q.** And do you agree that memory problems are frequently
15 the first subjective cognitive complaint in Parkinson's
16 disease?

04:14:10

17 **A.** It's frequently -- it is not the most common. It is
18 not unusual for people to complain of having difficult
19 memory, but it's actually not a memory problem. It's more
20 of an attention concentration problem.

21 **Q.** And it's definitely a prominent component of
22 Parkinson's disease dementia. Correct?

23 **A.** Yes. At the later stages of Parkinson's disease,
24 that is correct.

04:14:26

25 **Q.** Well, so, the later stages of Parkinson's disease --

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1 What's -- what's the difference between Parkinson's
2 disease dementia and dementia with Lewy bodies?

3 **A.** Well, it has a different clinical presentation. It
4 has a different natural course.

04:14:46

5 **Q.** Describe it for me.

6 **A.** Sure. The presentation of classic Parkinson's
7 disease -- And there's Parkinson's disease and then there
8 is Parkinson's disease plus or Parkinson's disease
9 dementia, PDD, where you have the usual physical types of

04:15:07

10 signs that you would classically have with Parkinson's
11 disease: Motor slowness, rigidity, lack of arm swing,
12 masked facies, things like that.

13 **Q.** I apologize. Maybe my question wasn't clear. I am
14 not asking you to describe the symptoms of Parkinson's
15 disease. I am asking you to distinguish between

04:15:27

16 Parkinson's disease dementia and dementia with Lewy
17 bodies.

18 **A.** Okay.

19 **Q.** Can you do that?

04:15:37

20 **A.** Yes, I can. I was trying to describe Parkinson's and
21 how Lewy body dementia or Parkinson's with Lewy body
22 disease is different.

23 The differing characteristics are the REM
24 sleep behavior disorder, variability of arousal,

04:15:55

25 oftentimes and in my experience -- I have seen this quite

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1 often -- is visual hallucinations that are fully formed as
2 far as the clinical characteristics. And the natural
3 course of it is a faster evolving course than Parkinson's
4 disease.

04:16:10

5 **Q.** What's the -- what's the timing difference?

6 **A.** My understanding is that Lewy body dementia will
7 progress much more faster over just three or four years;
8 whereas, Parkinson's disease is a longer course in
9 general.

04:16:33

10 **Q.** One moment. I want to make sure I did something
11 right.

12 And what about Alzheimer's disease? Do
13 you consider yourself an expert in Alzheimer's disease?

04:17:04

14 **A.** I believe I probably meet that definition, given my
15 current work setting and my history of teaching.

16 **Q.** Well, actually, let's -- since you're an expert in
17 Parkinson's, we should -- we should -- or consider
18 yourself an expert in Parkinson's, we should make sure we
19 cover it thoroughly.

04:17:19

20 Do you agree that Parkinson's has both
21 motor and non-motor symptoms that we discussed yesterday
22 with Dr. Darby that you heard about when you were sitting
23 in the gallery?

24 **A.** Yes.

04:17:38

25 **Q.** And, so, you agree that Parkinson's itself has

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1 learning and memory issues associated with it?

2 **A.** It can. However, you -- or it does, but you have to
3 define it where it is in the course. You're mushing it
4 all together as one entity saying that Parkinson's has
5 these concentration, memory and -- difficulties. Yes, it
6 does, when you look at the entire course of the disease,
7 but that's not the early manifestation of the condition.
8 It usually starts out with subtle difficulties that are
9 motor-oriented, not cognitive.

10 **Q.** And Parkinson's disease, again, often leads to
11 dementia?

12 **A.** It inevitably will if the patient survives long
13 enough, because it's a progressive neurodegenerative
14 disease. And it's at that later stage where you see all
15 of that dementia-related symptoms and signs.

16 **Q.** And dementia is a common symptom of Parkinson's.
17 Correct?

18 **A.** Yes, in the latter stages.

19 **Q.** So, your understanding is that is a common symptom in
20 the latter stages. Okay.

21 Let's talk about Alzheimer's.

22 You do some clinical work at the Missouri
23 Memory Center in "Boulevar" [phonetic], Missouri. Is that
24 accurate?

25 **A.** Yes. "Bolivar."

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1 Q. I apologize.

2 A. That's all right.

3 Q. And how often do you work there?

4 A. I work there from one to four days a week. It

04:19:26

5 varies. We have -- on Mondays is the Missouri Memory
6 Center Aging Clinic day, and other neurology patients are
7 slotted in throughout the rest of the week. And we also
8 are involved in Alzheimer's research that gets spread out
9 throughout the week. And there are occasional inpatient

04:19:50

10 evaluations I run into, too. So, it really varies. I am
11 always there on Mondays for sure, and then I am usually
12 there for at least one other day, sometimes three or four
13 other days.

14 Q. Okay. And, so, in a month, you know, at least -- at
15 least four, eight, maybe 12 days a month? Is that fair?

04:20:11

16 A. Oh, three -- yeah, somewhere between 12 and 15.

17 Q. Twelve and 15?

18 A. Sure. Although, when I am home, I am often writing
19 reports from the work that I was there. See, I'll

04:20:33

20 evaluate somebody and then I'll return home to my home
21 office where I'll write the report.

22 Q. Let me just -- Let me -- so, my question was: How
23 often do you work there? How often are you in the --

24 A. In the doors?

04:20:45

25 Q. Yeah, in the Missouri Memory Clinic.

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1 **A.** Yeah. And it would be about that amount. And I'm
2 just adding to that saying the days I am not there, I am
3 oftentimes writing reports at home for the work that I do
4 there.

04:20:59

5 **Q.** And memory impairment is the most pervasive feature
6 of Alzheimer's disease. Correct?

7 **A.** It's usually the first manifestation and it is
8 generally the most overwhelming difficulty, but there are
9 other difficulties, too, that come onboard.

04:21:15

10 **Q.** Well, in addition, there are -- non-memory cognitive
11 deficits can manifest early in the disease. Correct?

12 **A.** It depends on the -- on the specific type of
13 Alzheimer's disease. The majority of Alzheimer's --
14 because there is different types. There -- the majority
15 of the classic Alzheimer's disease, memory is the first
16 budding problem.

04:21:29

17 **Q.** So, your position is that, for classic Alzheimer's,
18 memory is the -- always the first presentation?

19 **A.** Pretty much always. There are behavioral variants of
20 Alzheimer's disease. There are also language-specific
21 types of Alzheimer's pathology that manifests a little bit
22 differently. But the majority of Alzheimer's disease,
23 yes, memory is the primary --

04:21:50

24 **Q.** How is the pathology different for -- I'm sorry.

04:22:05

25 What -- how is the pathology different for the language?

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1 What was it? Language what?

2 **A.** There's language concerns as well. Sometimes there's
3 different variants of Alzheimer's disease and it overlaps
4 with other conditions. Sometimes it can be starting out
5 with aphasia as the early signs of it. And it can become
6 more of a language-specific problem and memory then comes
7 in later. Or sometimes it starts out with behavioral
8 problems and problems in judgment but then evolves into
9 the more -- more full-blown Alzheimer's.

10 So, there's some minor variants that are
11 less common, but they do occur.

12 **Q.** And the variants have a different pathology?

13 **A.** Well, yeah. What I mean by different pathology is
14 that different parts of the brain are affected sooner than
15 what is typical in the -- I'll use the term "classic" or
16 the majority type of Alzheimer's cases.

17 **Q.** So, when you are saying different pathology, you are
18 saying different parts of the brain are affected and --
19 and that's a different variant of Alzheimer's? Is that
20 your --

21 **A.** There is different timing in the places of the brain
22 where the areas are involved, yes.

23 **Q.** And that's a variant of Alzheimer's. Does it have a
24 name?

25 **A.** Well, there is a behavioral variant. There are

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1 different language variants.

2 **Q.** Is that what they are called?

3 **A.** Yes.

4 **Q.** And, so, if -- if somebody presents with non-memory
04:23:42 5 cognitive deficits of executive function early in the
6 disease, is that classic Alzheimer's or is that some
7 executive function variant?

8 **A.** No. Well, generally speaking, that would make me
9 suspicious of a -- of a behavioral variant. I would also
04:24:05 10 consider the possibility of a frontotemporal dementia,
11 which is a total different pathology but overlaps and
12 looks the same in some instances.

13 But if there are behavioral executive
14 frontal-type problems and memory problems that are coming
04:24:21 15 onboard, then it can be the behavioral variant of
16 Alzheimer's disease; whereas, the regular Alzheimer's
17 disease does not have that behavioral executive
18 dysfunction up front. It will eventually, yes, but not up
19 front.

04:24:39 20 **Q.** I don't know if this is marked.

21 Are you familiar with the American Academy
22 of Neurology?

23 **A.** Yes.

24 MR. LOONAM: What number am I on? 56?

04:25:02 25 Government 56.

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 SUPPORT STAFF: Defense.

2 MR. LOONAM: Oh. Sorry. And I actually wrote
3 it "Defense." I apologize.

4 BY MR. LOONAM:

04:25:14

5 Q. I am showing you --

6 THE COURT: Excuse me, counsel. Do you have a
7 copy? Okay. Thank you. Are you going to admit this so I
8 can do it now?

04:25:26

9 MR. LOONAM: I am not going to admit it. I'm
10 just showing it to confront the witness. I am happy --
11 when it comes to these, Your Honor -- and the Court's
12 preference. We may refer to these as -- because they're
13 resource sources like I would refer to a case.

14 THE COURT: Okay.

04:25:37

15 MR. LOONAM: And we are happy to attach these
16 to make them available, if the other side --

17 I mean, if you guys want to admit them,
18 too, we are happy to admit them.

04:25:47

19 THE COURT: I just wanted to know whether you
20 needed a ruling from me. That's all.

21 BY MR. LOONAM:

04:26:08

22 Q. So, I am showing you what -- an article that's titled
23 "Alzheimer's Disease" by Liana Apostolova. It's titled
24 "Alzheimer's Disease," and on Page 2 of the article, on
25 the section "Cognitive Decline," it reads: "Memory

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04:26:28

1 impairment is the most pervasive feature of AD" --
2 Alzheimer's disease -- "although non-memory cognitive
3 deficits, e.g., aphasia, executive dysfunction, apathy, or
4 personal change can manifest early and even be the
5 presenting feature. In general, memory decline is
6 considered the leading symptom."

7 And, so, do you agree with this statement?

04:26:45

8 **A.** Yes. I would say that's the same thing that I said.
9 And those others would be typically viewed as variants of
10 it. They're not as common.

11 **Q.** So, they would -- and there -- and they each have
12 their own variant name and wouldn't be called Alzheimer's.
13 It would be Alzheimer's, you know --

04:27:02

14 **A.** A behavioral variant, Alzheimer's. If I recall
15 correctly, there is even a posterior type of a finding.
16 So, yeah, there is different unique variations.

17 **Q.** Is Alzheimer's disease reversible?

18 **A.** No.

19 **Q.** So, it's -- it's progressive. Correct?

04:27:18

20 **A.** Yes. It's considered a progressive neurodegenerative
21 disease.

22 **Q.** It's an irreversible downward trajectory. Correct?

23 **A.** Correct.

04:27:33

24 **Q.** Let's talk about delirium. We talked -- you
25 talked -- you testified about delirium in -- on direct.

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Do you recall?

2 **A.** Yes.

3 **Q.** And you discuss Mr. Brockman's delirium episodes in
4 your supplemental report. Do you recall that?

04:27:48

5 **A.** Yes, I do.

6 **Q.** And in your supplemental report you state that, "To
7 be sure, Mr. Brockman experienced episodes of delirium
8 while hospitalized for infection."

9 Do you recall that is what your report
10 states?

04:28:06

11 **A.** Yes.

12 **Q.** And you were referring to Mr. Brockman's three
13 hospitalizations at -- at the Houston Methodist in -- over
14 this past year. Correct?

04:28:17

15 **A.** Yes.

16 **Q.** And those hospitalizations were in March 15th to
17 19th, 2021; May 31st to June 11th, 2021; and September
18 15th to 18th, 2021. Correct?

19 **A.** Yes.

04:28:36

20 **Q.** And it's -- it's important that you have an
21 understanding of delirium so that, in exercising your
22 clinical judgment, you can account for how those episodes
23 of delirium may have affected Mr. Brockman's cognitive
24 ability. Correct?

04:29:00

25 **A.** Sure.

KATHY MILLER, RMR, CRR - kathy@miller-reporting.com

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. So, do you agree that preexisting dementia is the
2 leading risk factor for delirium?

3 A. In what populations?

4 Q. As far as risk factors for delirium, universally.

04:29:22

5 A. Okay.

6 Q. Are you aware that preexisting dementia is the
7 leading risk factor for delirium?

04:29:36

8 A. Yes. That has -- that has been written, and I agree
9 it is a leading risk factor. Infection, I think, would be
10 a pretty significant risk factor among the elderly for
11 delirium as well.

12 Q. And what is "cognitive reserve"?

04:29:58

13 A. "Cognitive reserve" is a term referring to people who
14 are very high functioning. They tend to not show as much
15 day-to-day difficulties in their functioning, particularly
16 like in learning, memory, that sort of thing. They don't
17 start to show those sort of difficulties until later in
18 the course of a disease because they have got extra
19 reserve. It's like, if you're going to lose brain cells
20 along the way, there is just more to lose, so to speak;
21 and, so, the person has a better time of it in context
22 of -- of progressing neurodegenerative disease, but it
23 could also be relevant to other things such as traumatic
24 brain injury as well.

04:30:22

04:30:41

25 Q. Okay. So -- so, we -- Does cognitive reserve apply

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1 to a subset of the population of high-functioning
2 individuals, or does everyone have cognitive reserve?

04:31:05

3 **A.** Everybody has cognitive reserve to some degree. When
4 you start talking about high-functioning people who are
5 bright and very accomplished and capable, they have more
6 cognitive reserve than people who are less bright and less
7 capable.

8 **Q.** And, so, cognitive reserve is -- directly correlates
9 with intelligence?

04:31:28

10 **A.** I -- I don't know if I would use the word "directly,"
11 but it does correlate with intelligence, yes. "Directly"
12 is an add-on. I'm not sure what that means.

04:31:42

13 **Q.** Well, I asked you to define "cognitive reserve," and
14 you defined it through people who are bright, who are
15 high-functioning, and, so, I'm just exploring what the
16 definition of "cognitive reserve" is.

17 And, so, everyone has cognitive reserve.
18 Correct?

04:32:00

19 **A.** Well, you know, it depends on how you define it.
20 Everybody has some level of cognitive reserve. Maybe some
21 people don't have any cognitive reserve. So, it -- I
22 mean, you know, how much cognitive reserve? I mean, if
23 you have got this much, do you have it? Maybe. If you
24 have this much, yes.

04:32:15

25 **Q.** Do all healthy people have cognitive reserve?

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1 **A.** Probably to some degree or other.

2 **Q.** And you said it depended on your definition. Are you
3 aware of competing definitions for "cognitive reserve"?

4 **A.** No. It was not so much your definition of "cognitive
04:32:43 5 reserve," but it was your definition of how much does
6 somebody have to have to be called having cognitive
7 reserve.

8 Brighter people have more brain capacity
9 to handle insults to the brain, whether they be
04:32:58 10 progressive, traumatic, what have you. Less bright and
11 capable people have less capability to bounce back to
12 that. That's the bottom-line issue.

13 **Q.** Let's try it this way. What happens for those people
14 who have no cognitive reserve? How would they go about
04:33:17 15 their day? What would that look like?

16 **A.** I don't understand your question.

17 **Q.** What happens if you have no cognitive reserve?

18 **A.** You live your life. I don't understand the question.

19 **Q.** Okay. So, if you have zero cognitive reserve, you
04:33:35 20 think that everything would be normal day-to-day?

21 **A.** I don't know that we're communicating as to what
22 "cognitive reserve" is --

23 **Q.** Okay.

24 **A.** -- because your questions make no sense to me.

04:33:51 25 **Q.** If you have no cognitive reserve, what happens upon

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 any insult to the brain?

2 **A.** That person with -- and it's hard to say, does this
3 person have no cognitive reserve?

04:34:05

4 Somebody with less cognitive reserve is
5 going to have more of a tough time of it recuperating from
6 some insult to the brain. Somebody with more cognitive
7 reserve deals with that issue better, which makes the
8 course longer, slower, maybe. They just have a less
9 difficult time with it in terms of daily functioning.

04:34:26

10 **Q.** And, so, the -- I am just exploring because you said
11 some people may have no cognitive reserve; and, so, I was
12 exploring what that would be like.

04:34:41

13 So, are you aware of people who, you know,
14 take a sleeping pill and that may trigger delirium because
15 the sleeping pill is seen as an insult to the brain? Have
16 you ever heard of that?

17 **A.** People can have reactions to medications like that,
18 sure. I don't know how that necessarily equates to
19 cognitive reserve.

04:34:57

20 **Q.** Okay. Do you think that somebody with little or no
21 cognitive reserve is more vulnerable to episodes of
22 delirium?

23 **A.** That, I do not know. I am not familiar with any
24 science on that subject.

04:35:23

25 **Q.** You don't deny that there is science on that subject?

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 **A.** I didn't say that.

2 **Q.** I am saying you don't deny that there is science on
3 that subject?

4 **A.** Correct.

04:35:31

5 **Q.** Yeah. I mean --

6 **A.** There might be. I just don't know of it.

7 **Q.** Would you expect there to be?

8 **A.** Not necessarily.

04:35:47

9 **Q.** So, for example, in this case where the defendant has
10 suffered three bouts of delirium in the last year, it
11 wouldn't occur to you to go research delirium and its
12 effects before you reach your conclusion?

13 **A.** Oh, no. I have read up on delirium and its effects.
14 I don't remember any -- any research specifically on
15 delirium and cognitive reserve and sleeping pills.

04:36:10

16 **Q.** Well, let's not add the -- sleeping pills were --
17 were -- Nobody is talking about people taking sleeping
18 pills as an example. What about research on delirium and
19 cognitive reserve and the relationship between delirium
20 and cognitive reserve and vulnerability? Are you aware of
21 that?

04:36:29

22 **A.** Not specifically using those terms.

23 **Q.** What are you aware of?

24 **A.** It would be logical that people who have a higher
25 cognitive reserve would be less prone to delirium. But

04:36:45

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

04:37:07

1 the bigger issue in the presence of delirium is a
2 precipitating problem, such as urinary tract infection,
3 and that's a great risk for delirium in the elderly. If
4 they have a urinary tract infection, they commonly become
5 delirious. It is not unusual.

6 Q. No. My question was: Does having a low cognitive
7 reserve make the brain more vulnerable to episodes of
8 delirium?

04:37:36

9 A. And I said I don't know specific science on that
10 point, that very specific point. I don't remember seeing
11 any research on cognitive reserve's effects on delirium.

12 Q. And are you --

13 MR. LOONAM: One moment, Your Honor.

14 THE COURT: Sure.

04:38:04

15 MR. LOONAM: The Court's indulgence.

16 THE COURT: Not a problem.

17 BY MR. LOONAM:

18 Q. I'll just use this one. And this is one I was
19 planning -- Are you familiar with *The Lancet*?

04:39:00

20 A. *Lancet*, yes.

21 Q. Yeah. That's a well-known journal?

22 A. Yes, it is.

23 MR. LOONAM: I'll make sure you get a copy.

24 I'll make sure you get it.

04:39:12

25 MR. SMITH: All right.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 MR. LOONAM: What am I up to?

2 SUPPORT STAFF: Is the same -- that was DX-58
3 before?

4 MR. LOONAM: Yeah. It could be.

04:39:23

5 SUPPORT STAFF: "Interface with Delirium"?

6 MR. LOONAM: No. "Delirium in Elderly People."
7 So, what's the new number?

8 SUPPORT STAFF: 56.

9 MR. LOONAM: I'll do 54. Thank you.

04:39:36

10 BY MR. LOONAM:

11 Q. I'm just going to show you the abstracts for purposes
12 here -- I mean, for time purposes.

13 Do you see the article "Delirium in
14 Elderly People"?

04:39:47

15 A. Yes, I do.

16 Q. And here's some research exploring whether delirium
17 is serving both as a marker of brain vulnerability with
18 decreased reserve and a potential mechanism for permanent
19 cognitive damage. Does this seem to be research that's
20 exploring the very topic we were just discussing?

04:40:10

21 A. Well, let me... (reading)

22 Yes, I don't know what research it's
23 digging into, but it is talking about that topic.

24 Q. I'll turn to Page 4, and it just -- "Etiology," the
25 highlighted section there that reads: "Thus, in patients

04:40:47

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 who are highly vulnerable to delirium, such as those with
2 underlying dementia and multimorbidity, a relatively
3 benign insult, such as a single dose of sleeping
4 medication, may be enough to precipitate delirium."

04:41:02

5 So, that's exactly what we were talking
6 about before. Correct?

7 **A.** Sure.

8 **Q.** *Lancet* is not an obscure journal, is it?

9 **A.** No.

04:41:14

10 **Q.** One of the most respected journals in the United
11 States, probably the world, for medical research
12 publication?

13 **A.** Is *The Lancet* from the United States?

14 **Q.** No. I am saying in the United States.

04:41:28

15 **A.** Oh, okay.

16 **Q.** I don't want to speak for the world because I don't
17 know what's popular in China. But in the United States
18 *Lancet* is among the most respected --

19 **A.** Sure.

04:41:36

20 **Q.** -- medical journals. Is that fair?

21 **A.** Yeah. No. I thought you were saying it was
22 published in the United States.

23 **Q.** I don't know where it is published.

24 (Counsel confer off the record.)

04:42:00

25 BY MR. LOONAM:

KATHY MILLER, RMR, CRR - kathy@millers-reporting.com

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. Anyway, it doesn't matter. There is definitely more
2 research.

3 Okay. But it -- it would be fair to say
4 that Mr. Brockman's episodes of delirium are important to
5 consider in assessing his permanent cognitive decline and
6 his current mental state?

7 A. Yes. They need to be taken into consideration.

8 Q. And yesterday you heard Dr. Darby's testimony about
9 how a single episode of delirium can accelerate the rate
10 of cognitive decline for persons with Alzheimer's disease.
11 You agree you were in the courthouse -- in the courtroom
12 for that?

13 A. I did. Yeah. I was curious as to whether that's
14 talking about people who develop delirium spontaneously in
15 their dementia or whether that's referring to people who
16 develop delirium as a result of secondary infection, and
17 I'm not sure if that's the same. But I am not -- I
18 haven't read that specific paper.

19 Q. Is there a paper that you're referring to?

20 A. No.

21 Q. Okay.

22 A. I'm just curious.

23 Q. And how -- so, delirium develops spontaneously?

24 A. There are -- yes. There are physiological changes in
25 the body that somebody who is ill can become delirious.

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1 Usually, there's a systemic problem somehow.

2 Q. And so -- and then the -- the -- is the effect on the
3 brain if it's spontaneous delirium versus delirium that is
4 triggered by an infection different?

04:43:51 5 A. Well, that's what I was curious about.

6 Q. You don't know?

7 A. No. I was just saying that I would be curious to
8 know if that's what they're differentiating there.

9 Q. Okay.

04:44:00 10 A. I don't know.

11 Q. Okay. Turning to your expert report dated June 21st,
12 2021 -- which -- what number is that? Is it -- Oh.
13 It's Government's 1. And I'd ask you to turn to Page 18
14 of that document. Let me get a clean copy for the ELMO.

04:45:08 15 You're at Page 18, sir?

16 A. Yes.

17 Q. And do you see the -- the heading "Recent
18 Hospitalizations"?

19 A. Yes, sir.

04:45:16 20 Q. All right. I am going to put this up on the ELMO.
21 It is Page 18 of Government's 1.

22 For Bob's hospitalization of March 15th to
23 19th, 2021, please direct us to the place where you
24 disclosed the fact that Bob had delirium during his
04:45:51 25 hospitalization. And if you want me to turn -- You have a

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1 copy there, right? Okay.

2 **A.** Yeah, I didn't mention it in that paragraph.

3 **Q.** Okay. So, concerning Bob's hospitalization in March
4 and the report you filed with the Court, you didn't
5 mention the fact that Mr. Brockman had delirium. Correct?

6 **A.** That's correct, not in that paragraph. I think I
7 mentioned he had multiple bouts of delirium elsewhere in
8 my reports. I know I have done that, but I don't remember
9 where.

10 **Q.** Okay. Well, let's focus on this report.

11 MR. SMITH: I am going to object to that. That
12 misstates the testimony. He said he did report delirium in
13 this report.

14 MR. LOONAM: No, he didn't say the reports.

15 MR. SMITH: Yes, he did. Not in that
16 paragraph, but in other paragraphs.

17 MR. LOONAM: Okay. You show me where he said
18 reports.

19 THE COURT: One second.

20 MR. SMITH: He said he didn't refer to delirium
21 in that paragraph, but he did in other paragraphs in the
22 report.

23 MR. LOONAM: Okay. We will go through it.

24 THE COURT: Hang on one second before you go

25 on. I just want to make sure.

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1 MR. LOONAM: He said: "I think I have
2 mentioned multiple bouts of delirium elsewhere in my
3 reports," plural.

04:47:28

4 THE COURT: "Reports," plural. He didn't say
5 this one.

6 MR. LOONAM: Yeah. And I am focused on this.
7 That's all.

8 THE COURT: Oh, Okay. I just wanted to be sure
9 I understood the answer.

04:47:35

10 MR. LOONAM: The June report for now. So,
11 Government's 1. Yeah. We will go through it, all the
12 recent hospitalizations here.

13 BY MR. LOONAM:

04:47:53

14 Q. Okay. And, so, even though you testified that
15 delirium -- an episode of delirium would be important to
16 consider in assessing Bob's current mental state, you
17 failed to disclose an episode of delirium in the March
18 hospitalization. Correct?

04:48:15

19 A. I didn't include it in that paragraph. In the
20 following paragraph talking about the next hospitalization
21 I discuss delirium.

22 Q. Okay. So, let's go through that.

23 In the next hospitalization you say:

04:48:28

24 "Medical records from Houston Methodist Hospital indicated
25 Mr. Brockman presented there on May 31st, 2021, with signs

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1 of confusion and potential urinary tract infection.
2 Admitting notes indicated" -- and I have moved to Page
3 19 -- "Admitting notes indicated he was unable to provide
4 history due to altered mental status, and family were
5 available to assist."

04:48:53

6 "On the previous morning" -- "on the
7 previous morning, they noticed he was more tired and had
8 to take a nap. Later, he began saying things" -- "he did
9 not make sense. Additionally, he was not eating and
10 tended to stare off blankly."

04:49:17

11 And, so, you believe that that paragraph
12 discloses an episode of delirium?

13 **A.** Signs of confusion. Yeah, that is delirium.

14 **Q.** Okay. So --

04:49:34

15 **A.** Those are the characteristics that make delirium.

16 **Q.** Sure. No. It -- so, yeah, delirium involves
17 confusion. Confusion could also come from other instances
18 other than delirium, though. Correct?

19 **A.** Well, they can. But in this context with confusion,
20 signs of confusion, potentially urinary tract infection,
21 admitting note saying he had altered mental status and the
22 tiredness the morning before, all of that suggests that
23 he's got a delirium going on.

04:49:53

24 **Q.** It's suggests delirium, but you are leaving it for
25 the reader to connect the dots and figure out that it's an

04:50:12

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1 episode of delirium. Is that -- that was purposeful?

2 **A.** No. That's not my intent.

3 **Q.** But you believe that this discloses delirium? Did
4 you -- Scratch that.

04:50:26

5 Did you review multiple records from this
6 hospitalization, pages and pages, where scan after scan on
7 repeated days for this defendant were -- were scans
8 that -- that showed the defendant was experiencing
9 delirium?

04:50:47

10 **A.** I reviewed the records, and there's a lot of
11 information, and I didn't include every word in all of it.
12 So, I mean, I reviewed it.

13 **Q.** And I am saying do you recall there were multiple
14 records that used the word "delirium" to describe this
15 defendant, and they did a screening -- screening, if it's
16 delirium? Do you recall that?

04:51:04

17 **A.** I don't recall specifically which hospitalization
18 that was in, but I do know that they exist.

19 **Q.** So, if hospital records for -- and many, many records
20 for this hospitalization specifically refer to delirium
21 and screenings for delirium, you would think you
22 accurately described those records by saying he presented
23 confused and in an altered state and didn't use the word
24 "delirium"? You think that would be accurate?

04:51:24

04:51:47

25 **A.** It's reasonably accurate, in my view, yes.

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1 Q. Reasonably accurate?

2 A. Yes, sir.

3 Q. So, you don't think it's important to use the actual
4 term for the medical condition that the defendant has been
04:52:06 5 diagnosed with -- has been diagnosed with?

6 A. Not necessarily, no. I am describing the
7 characteristics of it.

8 Q. You described in your direct testimony that the --
9 the neuro -- the neuroimaging was important to your
04:52:56 10 conclusions in this case. Do you recall that testimony?

11 A. Yes.

12 Q. And you specifically noted the -- the volumetric
13 analysis for -- that was conducted on the -- the MRI
14 scans. Correct?

04:53:20 15 A. Yes.

16 Q. And the volumetric analysis that's reflected in what
17 I refer to as "Neuroreader reports"?

18 A. Correct.

19 Q. All right. And in your report of materials, you
04:53:34 20 disclose reviewing the -- the MRIs, but I guess, part and
21 parcel to that, the Neuroreader reports were part of the
22 MRI scan?

23 A. Right. I did not review the actual MRI scan --

24 Q. Yeah.

04:53:53 25 A. -- just the reports related to the MRI scan.

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. Okay. And so -- All right. You reviewed the -- the
2 Neuroreader reports for the 2018 and the 2021 MRIs.
3 Correct?

4 A. Yes.

04:54:20

5 Q. And what you said was you -- it was important to you
6 that the defendant's brain, when compared against a
7 population of brains, fell within sort of normal
8 boundaries. Correct?

9 A. Yes.

04:54:37

10 Q. And you understand that normal boundaries, as
11 Dr. Darby described it with two standard deviations, would
12 include 95 percent of the population, approximately.
13 Correct?

14 A. Well, that's not the way I would have defined it, no.

04:55:00

15 Q. Okay.

16 A. I would have said -- Well, that's a broad spectrum,
17 that far out. I don't think that you could say that that
18 broad of -- you know, 95 sent of the population is where
19 you would define not normal. That's too broad of a range.
20 I don't think it goes that far to two standard deviations.

04:55:19

21 Q. Okay.

22 A. But beyond one standard deviation could be mild. Two
23 could be more moderate.

04:55:33

24 Q. So, you don't think the standard is two standard
25 deviations? You think, if it was one standard deviation,

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1 if you're outside that, then that would be abnormal?

2 **A.** No. It depends on what you are talking about.

3 **Q.** I am talking about the Neuroreader report --

4 **A.** Okay.

04:55:44 5 **Q.** -- that you were talking about.

6 **A.** No. In a Neuroreader report they're using
7 statistical probability, and that's two standard
8 deviations.

9 **Q.** Okay. So, we're talking about two standard
04:55:54 10 deviations. We're talking about excluding 95 percent of
11 the population is normal, and you have the two-and-a-half
12 percent on either side once you get out of the two
13 standard deviations. Correct?

14 **A.** You are not using it the proper way. No. It's not
04:56:08 15 correct.

16 **Q.** Okay. And would you agree that what you're looking
17 for in an MRI are signs of atrophy? Correct?

18 **A.** Yes.

19 **Q.** And, you know, as you heard yesterday with Dr. Darby
04:56:24 20 on the stand, with a neurodegenerative disease, you don't
21 necessarily have atrophy?

22 **A.** I am not sure that that's my recollection of what he
23 said. I believe that there will be atrophy as the disease
24 progresses.

04:56:43 25 **Q.** And so --

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 **A.** It's just late in its development. Later.

2 **Q.** Okay. So, you think the process that's underway of
3 how the -- the -- whatever the degeneration process is,
4 it -- for a neurodegenerative disease necessarily results
5 in atrophy?

04:57:07

6 **A.** It will, yes. It does.

7 **Q.** And -- and are there other processes taking place in
8 a neurodegenerative disease, such as neuronal disruption,
9 that do not result in atrophy?

04:57:25

10 **A.** Yes. In the very earliest stages there's neuronal
11 disruption, and as that disruption continues neurons die.
12 And as neurons -- as more and more neurons die, that area
13 of the brain shrinks, and that's called "atrophy."

14 **Q.** Okay. So, your understanding is that neuronal
15 disruption is just an early stage that is sort of a step
16 in the process to atrophy? That's your understanding?

04:57:46

17 **A.** It could be. Neuronal disruption doesn't necessarily
18 imply that it is going to be.

19 **Q.** And, so, if you are looking for atrophy, it's
20 interesting to compare a brain against sort of a general
21 population. Do you believe it would be more informative
22 to compare the brain against the same brain at different
23 points in time?

04:58:03

24 **A.** Not necessarily. It can show change, but that
25 doesn't necessarily mean that it's now become abnormal.

04:58:26

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

04:58:53 1 Q. Okay. So -- so, if you're interested in atrophy and
2 brain shrinkage, you don't think it's necessarily
3 interesting to compare a brain as it's progressing over
4 the course of years. You're more interested in taking a
5 brain and comparing it against a general population to see
6 if it becomes an outlier against the statistical
7 population.

8 Did I understand you correctly or do I
9 have that wrong?

04:59:02 10 A. Well, both are interesting.

11 Q. Okay.

12 A. So, I find both interesting.

13 Q. Okay. But if you are looking for actual atrophy --
14 right? So, let's put it this way:

04:59:12 15 If you're comparing a brain against a
16 control set, are you making assumptions that that one
17 snapshot of the brain fits within -- where it fits within
18 the general population as a comparator?

19 A. I don't understand your question.

04:59:34 20 Q. Okay. If you have a brain picture -- it's the same
21 brain, you can see actual signs of atrophy as opposed to
22 making assumptions when you are comparing it against sort
23 of a control set. Is that correct?

04:59:53 24 A. You can see changes in that brain longitudinally over
25 time, yes.

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1 Q. All right.

2 A. But that doesn't necessarily mean that the brain has
3 atrophied to the point that it is considered abnormal.

4 Q. Yeah. But you're --

05:00:04

5 A. Because there is atrophy in everybody's brain. I'm
6 sorry to say it, but everybody's brain is atrophying after
7 about 40 years of age to some degree. So, we can monitor
8 that. And if somebody has something happening that's
9 causing it to go a lot faster -- because they drink too

05:00:21

10 much -- then, it would probably start to show up as
11 abnormal compared to the normal population.

12 Q. Okay. I am going to show you --

13 MR. LOONAM: You guys have this 52 from
14 yesterday?

05:00:31

15 BY MR. LOONAM:

16 Q. So, this is Defendant's Exhibit 52 I've previously
17 provided to the government. What this document does is it
18 takes pictures from the 2018 Neuroreader report that you
19 reviewed in the top row and has the corresponding area of
20 the brain for the 2021 area below it. All right. Do you
21 see that?

05:01:03

22 A. Yes, I do.

23 Q. Okay. And, so, for the -- And did you -- did you
24 conduct a comparison of the 2018 and 2021 MRIs on your own
25 in the data you had to form your report?

05:01:29

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 **A.** Did I compare the MRIs?

2 **Q.** Yeah.

3 **A.** Not specifically. I looked at the reports.

05:01:49

4 **Q.** You looked at the reports as snapshots in time, but
5 you didn't say, 'I want to get a longitudinal view of
6 Mr. Brockman's brain and look at it in 2018 and look at it
7 in 2021 and see what it tells me'?

8 **A.** I don't remember specifically doing that, and I don't
9 necessarily recall seeing this pretty colored picture.

05:02:11

10 So, I guess I don't -- I don't recall.

11 **Q.** Okay. So, if you -- if you look at the hippocampus
12 in 2018, do you see where that -- the point is on the
13 graph?

14 **A.** Yes.

05:02:28

15 **Q.** And then if you go down to 2021, does it appear that
16 the hippocampus is larger or smaller in 2021?

17 **A.** Well, the dot is lower. There appears to be change
18 on this graph, but I don't know that that's a
19 statistically significant change.

05:02:49

20 **Q.** Yeah. No. I mean, the MRI is an imprecise tool.
21 Right?

22 **A.** Well, it can be pretty precise. It depends on what
23 we're talking about.

24 **Q.** Well, in the volumetric analysis of the brain --

05:03:02

25 **A.** Volumetric analysis is not necessarily precise. You

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1 didn't spell that out for me. Sorry.

2 Q. Let's go over to the temporal lobe, 2018. Do you see
3 the 2018 dot, where that is?

4 A. Yes.

05:03:19

5 Q. All right. And then you go down to 2021. What do
6 you observe there?

7 A. It looks like it's -- was at about the 50th
8 percentile and now it's about the -- I can't quite read
9 that -- low 20th -- 23rd, 25th percentile, something like
10 that.

05:03:38

11 Q. Does that seem statistically significant to you or
12 you just don't know?

13 A. It might be. I mean, there is change there,
14 probably. I can't say for sure. And that may correspond
15 with the onset of mild cognitive impairment.

05:03:48

16 Q. It might?

17 A. Yeah, it might.

18 Q. It might correspond to the onset of dementia as well.
19 Correct?

05:04:02

20 A. Well, and I was talking about MRI findings in context
21 of moderate to severe dementia, and I would say no.
22 Potentially early/mild, maybe.

23 Q. Early -- "early/mild" is a -- that's a repetitive
24 term. Right? No?

05:04:24

25 A. No.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. Okay. Frontal lobe, 2018. Do you see what that
2 shows? And then if you go down to the 2021, what do you
3 observe?

05:04:41

4 A. Again, there is a slight change. Again, I don't know
5 if it's a statistically significant change.

6 Q. Okay. So, you know, a volume change of, you know,
7 approximately 405 milliliters to 384, 385 milliliters.
8 You don't know if that's statistically significant or not?

05:05:10

9 A. No. Because there's considerable error in these
10 voxel -- volumetric studies, and I don't know if that
11 change overcomes the amount of error for both points.

12 Q. Yeah. So, there is a lot of error in these
13 volumetric analyses. Correct?

05:05:25

14 A. Sure. Yes. A score could be above what it is or
15 could be below. We don't know.

16 Q. Go to your -- Government's Exhibit 2.

17 THE COURT: Counsel, we will just keep going to
18 roughly 5:30. So, if we need to go past that, that's fine.
19 So, if you need more time -- You are not being rushed.

05:05:57

20 MR. LOONAM: Thank you, sir.

21 BY MR. LOONAM:

05:07:10

22 Q. So, Government's Exhibit 2. In your opinion to the
23 Court -- zoom in there -- I am on the last page, Page 21
24 of 21 -- you wrote: "But for the question of severe
25 memory disorder, there is no indication that Mr. Brockman

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1 would not be able to provide assistance to counsel."

2 Do you see -- did I accurately read what
3 you wrote?

4 **A.** Yes.

05:07:54

5 MR. LOONAM: Government's Exhibit 1, Page 21.

6 BY MR. LOONAM:

7 **Q.** So, here, you detailed an interview you conducted
8 with Peter Romatowski of Jones Day on June 15th of 2021.
9 Correct?

05:08:22

10 **A.** Yes.

11 **Q.** And in the middle of the paragraph -- I'll point it
12 out here -- you wrote, as Mr. Romatowski recounted to you,
13 "He" -- being the defendant -- "did not appear able to
14 remember facts to the extent one would expect, but memory
15 was less than half of it. More importantly, he was not
16 able to help us with information such as documents and
17 other information regarding potential witnesses. He said
18 he was not able to do what other defendants could do,

05:08:50

19 namely, helping reconstruct what happened. Mr. Romatowski
20 said a defendant can tell you how to make the inferences,
21 which are stronger and why, in looking at documents to
22 highlight important things attorneys may not see. From
23 early on, he said it was apparent that Mr. Brockman
24 struggled to do those things, and it became progressively
25 worse.

05:09:13

05:09:31

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1 "He noted Mr. Brockman badly wanted to
2 help but was very suggestible. Mr. Romatowski noted that
3 Mr. Brockman would repeat back and distort information he
4 had heard previously. He noted these examples occurred
05:09:48 5 regarding facts that were neutral, so it did not appear
6 like he was trying to make his case more favorable.

7 "Mr. Romatowski said, 'He cannot weigh the
8 evidence or weigh the strength of the evidence. He just
9 cannot do it.' He noted that the more they would dig into
05:10:08 10 the details, the more Mr. Brockman would retreat to high-
11 level anecdotes and reports of Reynolds operations or
12 something else not related to the details which they were
13 dealing with."

14 Is Mr. -- the information Mr. Romatowski
05:10:35 15 provided to you consistent with your statement to the
16 Court that, but for the question of severe memory
17 disorder, there is no indication that Mr. Brockman would
18 not be able to provide assistance to counsel?

19 **A.** Your question again?

05:11:01 20 **Q.** Is -- is your statement to the Court consistent with
21 the information Mr. Romatowski provided to you?

22 **A.** Well, most of what Mr. Romatowski described I would
23 say falls under the issue of memory-related; and, so,
24 that's reasonable.

05:11:26 25 The -- the other issue is I have to take

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1 what Mr. Romatowski tells me with some grain of salt
2 regarding how accurately it reflects the situation.

3 Q. Why is that?

4 A. He's involved in defending Mr. Brockman in this case.

05:11:58

5 Q. So? What -- why -- why does that matter with respect
6 to the information Mr. Romatowski provides to you?

05:12:27

7 A. Well, it is not uncommon, in my experience, for
8 attorneys who hire -- or attorneys who interact with
9 mental health experts in a case to present ardently a very
10 particular viewpoint, and I have found that that viewpoint
11 is not always as it seems. And it happens on all types of
12 cases, all situations.

05:12:49

13 As soon as I get a call from a personal
14 injury lawyer asking me to hear this really terrible case,
15 immediately they're starting to try to create a picture
16 for me. So, as a forensic examiner, I have to listen to
17 that and evaluate its relevance and its importance in the
18 overall picture. And, so, I -- no disrespect to
19 Mr. Romatowski or any of the defense team. I just say,
20 okay, let's see how that stacks up with the rest of the
21 test data.

05:13:16

05:13:35

22 And in a -- in a situation where the
23 person is clearly grossly exaggerating and from early on
24 in the course of this litigation, it's very possible that
25 counsel is also falling victim to that exaggeration, I

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1 just have to be somewhat critical in -- in assessing it.
2 That's all.

05:13:59

3 **Q.** So, being a -- looking at things with a critical eye
4 is the job of a forensic examiner. That's a given and
5 that's completely appropriate. But are you saying that
6 you have to take what Mr. Romatowski said with a -- with a
7 grain of salt, I think was your term, because he is a
8 defense lawyer?

05:14:22

9 **A.** No. Because he has been involved with Mr. Brockman
10 in the defense of this case. And that may -- Mr. Brockman
11 may have succeeded in also -- As I mentioned in one of
12 these reports, that the exaggeration aspect of this I view
13 as a ruse, and that may very well have encompassed counsel
14 as well.

05:14:44

15 **Q.** Didn't the Supreme Court -- you talked about how you
16 reviewed cases from the Supreme Court and some smaller
17 courts, I think is the term you used, or appellate courts
18 and smaller courts.

05:14:58

19 Are you familiar with any case law that
20 says that the defense lawyer is going to be uniquely
21 positioned to provide insight with respect to a
22 defendant's ability to provide assistance of counsel?

05:15:18

23 **A.** Oh, yeah, that's absolutely true. And in the context
24 of a defendant who's not necessarily grossly exaggerating
25 that is all the more true.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 But in a context where there is ample
2 indication, in my opinion, that Mr. Brockman is
3 significantly exaggerating and maybe even orchestrating
4 some of the presentation related to his severe memory
05:15:35 5 problem and presence of dementia, particularly early on in
6 the case, I have to view that information a little bit
7 differently.

8 Q. And, so, you -- if I read this paragraph where it
9 says, "But for the question of severe memory disorder,
05:15:55 10 there is no indication" -- "no indication that
11 Mr. Brockman would not be able to provide assistance of
12 counsel."

13 So, given that sentence, is it fair to say
14 you completely discounted the information that
05:16:13 15 Mr. Romatowski provided to you?

16 MR. SMITH: I'm sorry. I've got to object. He
17 has already answered this question twice.

18 THE COURT: I am -- I am going to respectfully
19 overrule the objection. The witness can answer the
05:16:23 20 question.

21 A. This sentence in the context with where it is in my
22 report, where I am pulling things together and describing
23 the information from the paragraph above it and putting it
24 in context, I would -- if I could go back and change it, I
05:16:44 25 would say "no valid and reliable indication." That would

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 probably clarify it better. But in the context with where
2 this is in the report, I believe it's accurate.

05:17:07

3 Q. Okay. So -- and that would go for the information
4 provided to you by Ms. Keneally as well, who in the
5 interest of time I don't need to go through it, but who
6 also provided information about problems with Mr. Brockman
7 that went beyond memory problems. Correct?

05:17:30

8 A. Yes. And they were -- particularly, her information
9 was presented very ardently, and I have to weigh that as
10 part of my assessment process.

11 Q. But -- and you -- you talked about, you know, you get
12 calls from personal injury lawyers. Do you know who Pete
13 Romatowski is?

14 A. I know he's a well respected lawyer.

05:17:46

15 Q. Yeah, he is. He's Chief of the Securities and
16 Commodities Fraud Task Force in the Southern District of
17 New York.

18 A. I did not know that.

05:18:00

19 Q. And one of the pioneers of insider trading law, *U.S.*
20 *v. Carpenter*. Are you aware of that?

21 A. Not my area of expertise.

22 MR. SMITH: I don't understand what the
23 relevance of this line of inquiry is, Your Honor. Sorry.

05:18:10

24 THE COURT: Okay. I am -- I am going to allow
25 the question; so, respectfully, overruled.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 BY MR. LOONAM:

2 Q. Yeah. And Ms. Keneally -- are you aware that
3 Ms. Keneally was the Assistant Attorney General of the
4 United States, Tax Division?

05:18:29

5 A. I am aware of that, yes.

6 Q. But because she gave you the information -- I'm
7 sorry. How did you describe the manner in which she
8 provided the information?

05:18:42

9 A. Well, that's making it simplistic. In the context of
10 representing this criminal defendant is a totally
11 different role than what she was when she was working in
12 the other agency.

05:19:00

13 Q. So, just to be clear, do you think defense counsel
14 would lie to you or provide you with false information in
15 order to assist the defendant in his defense? Is that --
16 is that your position?

05:19:19

17 A. Well, that is a possibility. I am not suggesting
18 that. I am saying it is also a possibility that the
19 defendant has successfully exaggerated with counsel in
20 such a degree that counsel honestly believes it. That
21 does not necessarily make it accurate in terms of the
22 context of my clinical formulation.

05:19:43

23 Q. And, as a result of that risk, you -- you discounted
24 the information to the point where it provided no
25 indication to you of any issue beyond memory issues.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Correct?

2 **A.** To be fair, no valid and reliable, in context with
3 the gross exaggeration that has been started since
4 certainly 2019 and in the context of the descriptions of
05:20:02 5 how he presented his memory problems to them initially,
6 yes.

7 MR. LOONAM: I am going to, Your Honor, play
8 videos from the -- the May interview and, also, the October
9 interview at this time.

05:20:35 10 THE COURT: Okay.

11 MR. LOONAM: And, so, can we switch from the
12 ELMO to the video capability?

13 And, Dr. Denney, I am going to play a
14 video -- a snippet of a video from your interview with
05:20:55 15 Mr. Brockman on May 20th, which I believe is Government's
16 Exhibit 4, and this snippet -- we have got to keep this
17 snippet and we are going to make it into a separate
18 exhibit, and we will make it GX-4A.

19 THE COURT: Do you have the reference for it,
05:21:13 20 just to -- because the court reporter is not going to be
21 taking this down word for word, so I just want to make sure
22 that we --

23 MR. LOONAM: Yes. Okay. So, it's -- 4A will
24 be -- Can you read this writing, just read it into the
05:21:26 25 record for me.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 MR. VARNADO: Transcript Page 51, Line 1,
2 through Transcript Page 53, Line 21 --

3 THE COURT: Great.

4 MR. VARNADO: -- from Government's Exhibit 4.

05:21:36

5 THE COURT: Thank you.

6 MR. LOONAM: Thanks.

7 *****

8 **(Video played as follows:)**

05:21:49

9 DR. DENNEY: Would you be expected to tell your
10 attorney everything that you know and remember about your
11 case? I mean, the situations, the details?

12 MR. BROCKMAN: Yes.

13 DR. DENNEY: Do you expect any problems in
14 being able to tell her and the team those sorts of details?

05:22:08

15 MR. BROCKMAN: I don't think so.

16 MR. LOONAM: Can we stop there?

17 THE COURT: Can we turn it up just a little
18 bit?

19 **(Video playing.)**

05:22:14

20 "DR. DENNEY: You can answer if you wish."

21 **(Video paused.)**

22 MR. LOONAM: And, Your Honor, you asked for the
23 audio to go up a bit?

24 THE COURT: Yes.

05:22:21

25 MR. LOONAM: Are we able to send the audio up a

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 bit?

2 THE COURT: Or maybe we can do it from our end.

3 I'm not sure.

4 (Counsel confer off the record.)

05:22:48

5 MR. VARNADO: Start it over.

6 **(Video played as follows:)**

7 DR. DENNEY: Would you be expected to tell your
8 attorney everything that you know and remember about your
9 case? I mean, the situations, the details?

05:23:07

10 MR. BROCKMAN: Yes.

11 DR. DENNEY: Do you expect any problems in
12 being able to tell her and the team those sort of details?

13 MR. BROCKMAN: I don't think so.

14 **(Video paused.)**

05:23:20

15 *********

16 MR. LOONAM: Can we stop there? Pause it.

17 BY MR. LOONAM:

18 **Q.** And, so, Dr. Denney, in drawing your conclusions, I

19 believe, you -- you were of the opinion that the

05:23:41

20 defendant, during the interview portion, presented to you
21 better than he was testing. Is that a -- a fair way to
22 put it?

23 **A.** Correct.

24 **Q.** And -- but do you have any doubt that the defendant

05:24:00

25 was aware that the interview part of the process was --

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 was part of the examination?

2 **A.** No. I am sure he understood that was part of the
3 examination. I don't know that he appreciated the
4 possible impact that would have when it's so disparate
5 from the test data.

05:24:22

6 **Q.** So, you think in Mr. Brockman's mind, when he was
7 speaking with you and Dr. Dietz, he thought that how he
8 was perceived in this interview wouldn't impact his -- the
9 determination you would make in your competency

05:24:53

10 assessment?

11 **A.** No, I didn't say that.

12 **Q.** You do think that he was aware that you would play --
13 you believe he -- he thought that you would place more
14 weight on the testing data versus the interview portion?

05:25:05

15 **A.** Not necessarily, no.

16 **Q.** Okay.

17 **A.** Maybe. Possibly.

18 **Q.** Possibly? So, do you know if Mr. Brockman even knew
19 that -- that there was some distinction between forensic
20 testing and the interview process?

05:25:18

21 **A.** Well, I'm sure he was aware of the difference between
22 interviewing and testing.

23 **Q.** Well, when he goes through it. At this stage, do you
24 know whether he was aware of any distinction in the
25 examination between interviewing and testing?

05:25:35

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 **A.** I -- I don't know how to answer that question. Of
2 course, he knew the distinction between interviewing and
3 testing. I presume that's the case.

05:25:51

4 **Q.** As he is sitting there, do you know if he knew he was
5 going to be subjected to testing?

6 **A.** Oh, yes. Yeah. Sure.

7 **Q.** And what's the basis of that?

8 **A.** We explained that that's -- that's a part of it.
9 I --

05:26:05

10 **Q.** You explained that --

11 **A.** Well, isn't that -- I guess I am assuming he would
12 know that. He has been tested before. I asked him if
13 he -- I -- if I recall correctly, I thought I had asked
14 him if he had been through this before, had other testing
15 done.

05:26:24

16 **Q.** And, so, you think, here, he's just letting his guard
17 down; whereas, when he's testing, that's when he's -- he
18 decides, 'Oh, now, I need to exaggerate my symptoms'?
19 That's --

05:26:41

20 **A.** I mean, that's a very simplistic way to put it, but,
21 basically, it's true, that there -- You have to understand
22 that a person who is exaggerating for secondary gain is
23 trying to create a picture, and it's a picture that they
24 don't fully understand how to create and, so, they think,
25 'Okay. I need to perform more poorly on testing than I

05:27:05

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 really do. I've got to look like I'm impaired, but I
2 don't want to overdo it.'

3 It's -- literally, a person is somewhat
4 shooting in the dark when they're trying to exaggerate
05:27:18 5 because they're not being genuine in their behaviors.

6 And, so, it's a -- it's a hit and miss for them. They
7 really don't know. And, so, it's very possible and very
8 common, actually, when they will misjudge that.

9 Q. And this is the same person who you believe has the
05:27:37 10 capability to vitiate a lot of the tests that -- that you
11 administer?

12 A. Yes.

13 Q. So, he's smart enough to be able to vitiate the tests
14 but doesn't realize that this interview is part of the --
05:27:58 15 an important part of the evaluation process?

16 A. No. He understands that the interview is a part of
17 the evaluation process. It's just -- it's the judgment of
18 'How impaired do I need to look in comparison to how
19 impaired do I look on the test data?' Because people have
05:28:14 20 very little understanding of how much impairment looks
21 like on test data. That is a harder thing to judge
22 because it is so foreign to a person.

23 Interacting with you face-to-face is much
24 more within a person's control. And I don't believe he
05:28:30 25 appreciated the fact that the test data would look so much

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 more severe than his presentation. And vitiating the
2 test, validity test, is not a hard task if one knows the
3 way to do it, and it can be very simple.

4 **Q.** Vitiating the test is very simple?

05:28:49

5 **A.** Yeah. There are some rules that, if somebody knows
6 those rules or somebody looks them up or learns them on
7 the internet or is told them or is taught them, yes, they
8 can be beaten pretty easily.

05:29:04

9 **Q.** So, if you have, say, a pool of graduate students
10 that you want to have, and you specifically instruct those
11 graduate students that they're going to take these tests
12 and simulate malingerer, those graduate students in
13 psychology would know the rules. You would think they
14 would be able to obtain -- across the board they would be
15 able to obtain a genuine memory impairment, because
16 they could -- it's so easy to beat the rules. Correct?

05:29:27

17 **A.** Well, it is easy to beat the rules if somebody
18 instructs you exactly how to do it. Those students were
19 not instructed to do anything other than simulate
20 dementia. They were not told specifically how to beat the
21 test.

05:29:42

22 **Q.** Because not a single one, not a single graduate
23 student of these -- these psychology graduate students
24 were able to -- who were told to simulate and try and get
25 a genuine memory impairment, could not do it across the

05:30:00

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1 three green tests -- the Word Memory Test, the nonverbal,
2 and the MSDT? Sorry. I am sure I got that wrong, but --

3 **A.** That's right.

4 **Q.** Correct?

05:30:17

5 **A.** Well, there was one that actually was able to do it
6 somewhat enough to win the prize. But most of them, no,
7 they were not able to do it.

8 **Q.** In your study you said no one was able to do it,
9 didn't you?

05:30:30

10 **A.** Well, there is one case that is -- that is equivocal.

11 MR. LOONAM: Is this marked? What am I up to?

12 SUPPORT STAFF: Defendant's 57.

13 MR. LOONAM: Defendant's 57, yes. I'm sorry.

14 Is there a highlighter there? Make it easier.

05:31:32

15 BY MR. LOONAM:

16 **Q.** Okay. So, I am showing you Defense Exhibit Fifty --
17 Oh. Could we go back to the ELMO? I'm sorry.

18 I am showing you Defense Exhibit 57, which
19 is an article titled "The Detection of Feigned Impairment
20 using the WMT, MSVT and NV-MSVT," and the authors are
21 Armistead-Jehle and Denney. I apologize for
22 mispronouncing your coauthor's name.

05:31:50

23 **A.** That's all right.

24 **Q.** I am going to turn to Page 152 of the article. I am
25 going to read the highlighted portion.

05:32:11

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1 "Across the three tests, no participant
2 was able to produce genuine memory-impaired profiles
3 (GMIPs) across all measures."

4 Stop there.

05:32:31

5 What were the measures?

6 **A.** The Word Memory Test, the MSVT and the nonverbal
7 MSVT.

05:32:47

8 **Q.** "However, one participant was able to produce a GMIP
9 on the Word Memory Test and the MSVT and create a passing
10 NV-MSVT that evidenced deficient memory."

11 But the statement that none of the
12 participants were able to produce GMIPs across all three
13 measures is correct. Right?

05:33:12

14 **A.** Yes. And I was equivocating on that "however" person
15 because he created a -- a memory-impaired profile. It
16 just wasn't the GMIP specifically.

17 **Q.** Yeah. It was a passing score. It was not the -- the
18 genuine memory-impaired profile. Correct?

19 **A.** Right. 50 percent of them created GMIPs on the MSVT.

05:33:31

20 **Q.** Yes.

21 **A.** So, they were able to do that. And about 30 percent
22 did the same on the WMT. But it's hard to do it on all
23 three at one time.

05:33:43

24 **Q.** The point of the study was to combine those tests to
25 increase the sensitivity to be able to filter out the

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 fakers from those with a true, genuine memory impairment
2 profile. Correct?

3 **A.** Yes, to see how -- how the sensitivity was with all
4 three put together in the same battery.

05:33:56

5 **Q.** And there was previous work that, if you combined
6 two, you got to 80 percent sensitivity?

7 **A.** Yeah. That's probably about right.

05:34:15

8 **Q.** And you wrote that, when you combined three -- you
9 combined the Word Memory Test, you combined the MSVT and
10 you combined the Nonverbal MSVT -- you got to 100 percent
11 sensitivity. Right?

12 **A.** Well, again, it's equivocal because of that one
13 person, but it's very high. Yes, all three together is
14 very high.

05:34:32

15 **Q.** I will just go to the line before here. "As such,
16 the sensitivity of the NV-MSVT in combination with the WMT
17 or the MSVT was 100 percent"?

18 **A.** Yes.

05:34:50

19 **Q.** So, what does that mean when the sensitivity is 100
20 percent?

21 **A.** It was able to identify all of these simulators.

22 **Q.** And what -- I mean, what is "sensitivity"?

23 **A.** The ability to detect exaggeration when it's there.

24 **Q.** And, so, what this was was you combined these --

05:35:07

25 **A.** Yes.

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. -- and it has 100 percent sensitivity, meaning it can
2 detect the fakers?

3 A. In this sample of graduate students, yes.

05:35:22

4 MR. LOONAM: All right. Can we -- I'll go back
5 to the -- I just want to finish this clip.

6 THE COURT: Sure.

7 MR. LOONAM: All right. Maybe we will play the
8 next clip, too, just so we can make the comparison.

9 Can we play it?

05:35:32

10 *****

11 (Resuming Video.)

12 DR. DENNEY: And, sir, if you wish, you can not
13 answer if you -- if you believe you shouldn't, but I'm
14 going to ask the question anyway.

05:35:44

15 What -- what lead agents to arrest you?
16 Do you have any idea what sort of things lead the agents to
17 arrest you in the first place?

18 MR. BROCKMAN: I'm sure there was a reason, but
19 I don't know what it was.

05:35:55

20 *****

21 (Video paused.)

22 MR. LOONAM: Can we pause that?

23 BY MR. LOONAM:

24 Q. Was Mr. Brockman arrested by agents?

05:36:09

25 A. Well, he -- you know, he may not have been. I mean,

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1 I meant --

2 Q. You don't know?

3 A. I meant as -- yeah, as a loose term, arrested. I
4 should have said "indicted," is what I was meaning, but I
05:36:23 5 said "arrested."

6 Q. But he provided information back to you, and you
7 didn't know one way or another whether or not he was
8 arrested in evaluating the information he provided to you?

9 A. No. I wanted to know what his -- I was asking him if
05:36:36 10 he knew the basis on which he was getting in trouble with
11 the law. I used the word "arrest," and that was
12 inappropriate. I should have said "indicted." But it's
13 the same point. It's going to the same issue.

14 Q. And, by the way, just to go back, you -- on the
05:36:54 15 study, I didn't close the loop, and I should have because
16 I assume too much in my head, Judge.

17 But on the -- the three tests that you had
18 100 percent sensitivity for in detecting the fakers, if
19 they were combined -- was Mr. Brockman administered those
05:37:14 20 same tests?

21 A. Over the course of separated months, yes.

22 Q. Did he take it six times?

23 A. Six times?

24 Q. Yeah. If you combined all those tests, he took six
05:37:27 25 Green tests?

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1 A. Maybe five.

2 Q. Okay. About five?

3 A. Yeah. Sure.

4 Q. Okay. And you don't -- you don't think it was six
05:37:42 5 but five.

6 Okay. And did he generate a genuine
7 memory-impaired profile in every single one of those
8 tests?

9 A. No.

05:37:53 10 Q. Which one didn't he generate a genuine memory-
11 impairment profile?

12 A. He did not produce a GMIP because of an implausible
13 problem in Dr. Guilmette's assessment on the MSVT.

14 Q. Well, what was it --

05:38:09 15 A. I believe the second one.

16 Q. And it was in how it was administered is your issue
17 with it or --

18 A. No.

19 Q. Oh, assessment. So -- so, to be clear, what

05:38:20 20 happens -- let me -- let's be clear here. And we will
21 have -- there's going to be a whole line of questioning,
22 but is it -- is it true that the -- that the subject, the
23 defendant, takes the test, potentially on the computer, or
24 not. The test data is entered into the computer. It's
05:38:39 25 sent out to Dr. Green's computer algorithm, whatever it

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ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 is. It spits out the test results. If you have the AI
2 program with it, it then gives you the results and it will
3 indicate -- going through the algorithm that is designed
4 to screen out the fakers, it will indicate possible
05:39:00 5 genuine memory impairment profile. It's then that you
6 exercise your clinical judgment on whether or not there's
7 a genuine memory impairment, but -- but you get the
8 profile from the program it comes out.

9 My question is: In every single one of
05:39:17 10 the Green tests administered to Mr. Brockman, did the
11 program -- the algorithm spit out that he had obtained a
12 profile for a genuine memory impairment?

13 **A.** No.

14 **Q.** Okay. And -- and you're taking issue with --

05:39:34 15 **A.** The printout in Dr. Guilmette's evaluation, and I
16 suspect it will show up here.

17 **Q.** Okay. Well, we will take a look at that.

18 MR. LOONAM: Should we press "play"?

19 *****

05:39:48 20 **(Video resumed as follows.)**

21 DR. DENNEY: Have you confessed to anything --

22 MR. BROCKMAN: No.

23 DR. DENNEY: -- in this case? No?

24 Are you -- I'm trying to dance around it a
05:40:05 25 little bit. Are you able to describe what -- what it is

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1 that the government claims you did wrong? I mean, not to
2 us necessarily, but can you describe it?

3 MR. BROCKMAN: Somewhat but, you know,
4 basically not completely.

05:40:29 5 DR. DENNEY: Okay.

6 MR. BROCKMAN: Not even very much. I mean,
7 it's -- the -- the area of the law -- and, of course, since
8 I know nothing about law, generally. But it looks to me
9 like it is -- the statutes involved in it are complex
10 themselves. And, so, that's what -- I rely on my
11 attorneys, you know. They now understand enough of my
12 business where that's -- I'm no longer, you know, crucial
13 to what's going on.

14 DR. DENNEY: Okay. So, you've sort of -- it
05:41:11 15 sounds like you've played your part. I mean, you've
16 fulfilled your role in the sense of trying to help your
17 attorneys understand the nature of your business, and they
18 understand that pretty well now at this point?

19 MR. BROCKMAN: To listen to them, I would say
05:41:27 20 no.

21 DR. DENNEY: Okay. Not as much as you would
22 like them to?

23 MR. BROCKMAN: Yeah. Well, they understand as
24 much as it's reasonable for them to understand. But,
05:41:42 25 again, the business itself is very complex. And the -- the

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 policies and practices and procedures are very, very, very
2 complex. And I'm confident that my attorneys will
3 ultimately get a level of knowledge and understanding that
4 I think is appropriate, but I don't know how long that's
5 going to take.

05:42:10

6 DR. DENNEY: Okay. But they're working on it?

7 MR. BROCKMAN: Yes.

8 DR. DENNEY: And you're proud of what they have
9 done so far --

05:42:17

10 MR. BROCKMAN: Yeah. I think --

11 DR. DENNEY: -- but there is a lot more that
12 needs to be done?

13 MR. BROCKMAN: Exactly.

14 (Video concluded.)

05:42:23

15 *****

16 BY MR. LOONAM:

17 Q. So, when Mr. Brockman, in trying to talk about the
18 charges in this case, talks about the business practices,
19 policies and procedures, do you have an understanding of
20 what he was referring to?

05:42:31

21 A. Yes. He was talking about Reynolds and Reynolds.

22 And, if I may, Your Honor, I understand
23 where this is now in the interview process. This was in
24 the midst of the competency assessment instrument, which
25 is why I used the word "arrest." It's off the outline.

05:42:45

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 Q. Yeah. No. This is the sort of interview process
2 that you had described this morning. Correct?

3 A. Yeah. Part of the competency assessment instrument,
4 sure.

05:42:58

5 Q. And it was off of that that you, you know, I think --
6 I think you opined that, you know, there was a factual,
7 rational understanding of the case based on -- it was this
8 interview. Right?

05:43:18

9 A. Well, in -- in part, in part the extra as well. But,
10 also, you have to keep in mind that Mr. Brockman was
11 unwilling to talk specifics about those instances. He
12 refused to do that. He said he would not do that.

05:43:34

13 So, I was, at this point, trying to talk
14 around it to see if I could get him to open up and talk a
15 little bit more about the things that would be important.

16 Q. All right. And what -- what role does Reynolds and
17 Reynolds have in the indictment?

18 A. Very little.

05:43:54

19 Q. So, the -- when asked about the charges and
20 Mr. Brockman is talking about the business policies and
21 procedures of Reynolds and Reynolds, is he demonstrating
22 an understanding of the charges against him?

05:44:15

23 A. Not that specific question, no. But he is able to
24 describe a bit -- complicated processes and things like
25 that a little bit.

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1 Q. But -- but when he is -- in understanding that the --
2 the facts that lead to his arrest or the charges against
3 him, he's describing Reynolds, we just saw the answer is,
4 no, he's not expressing an understanding of the charges
05:44:41 5 against him. Correct?

6 A. On this particular moment. But on the ECST-R in
7 October, he did.

8 Q. Oh. You did this again in October, right?

9 A. No.

05:44:52 10 Q. Oh, you didn't do this in October?

11 A. No. I used a different competency assessment tool.

12 Q. A different competency assessment tool.

13 MR. LOONAM: Could we play the next clip?

14 BY MR. LOONAM:

05:45:03 15 Q. Did you videotape that competency assessment that you
16 are referring to?

17 A. No. This is more of a test. I have got it written
18 down. What he did.

19 Q. Okay. So, in --

05:45:11 20 A. The test data.

21 Q. -- in October, after Mr. Brockman had several bouts
22 of delirium and reportedly experienced, you know,
23 significant cognitive decline, in -- to obtain the
24 information regarding his rational and factual

05:45:30 25 understanding of the case against him, you conducted a

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 test that was not videotaped. Correct?

2 **A.** Right. It was security concerns regarding the test.
3 The publisher said, Don't do that.

05:45:45

4 **Q.** But you didn't do this same exercise here where you
5 asked sometimes open-ended questions to try and understand
6 what Mr. Brockman knew? You didn't do that same sort of
7 interview in October. Correct?

05:46:02

8 **A.** Well, no. It is very similar in that regard. It's
9 not the exact same instrument, but it is also a semi-
10 structured interview that allows you to ask questions to
11 help flesh out what their response is regarding the topic.

05:46:28

12 **Q.** Okay. So -- so, it was proprietary concern -- you
13 didn't have the proprietary concerns when you first
14 conducted the -- the structure or semi-structured
15 interview, but you had proprietary concerns about doing it
16 in October?

17 **A.** Because it's a different instrument. The CAI, there
18 is no -- that is not a concern. But for the ECST-R, the
19 publisher says it is.

05:46:41

20 **Q.** And you chose -- you get to choose the manner in
21 which you are going to ask the questions to the defendant.
22 Correct?

23 **A.** I -- not completely, no.

05:46:59

24 **Q.** You don't -- you -- could you have decided to ask the
25 same questions you asked that were videotaped in May when

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 you assessed the defendant in October?

2 **A.** Oh. That's what you're asking? Yes. I choose the
3 method that the -- the evaluation is going to undergo,
4 yes.

05:47:15

5 **Q.** And you chose a method that had proprietary concerns
6 that couldn't be videotaped. Correct?

7 **A.** Well, that was not why I chose it.

05:47:38

8 MR. LOONAM: Could we play the -- I am going to
9 play a clip of part of the interview in October. This is
10 going to be -- Here. Sorry. This is going to be from the
11 October 20th interview. It's from Government's Exhibit 93.
12 We will label this clip 93-A. And Mr. Varnado will be kind
13 enough to read in the actual section of it.

05:48:00

14 MR. VARNADO: It's going to be from Page 27,
15 Line 18, to Page 31, Line 9, the first one, 93-A.

16 MR. LOONAM: Is the ELMO on? Do we go to the
17 video? Please go to the video. I apologize. I should
18 have signaled that. I apologize. I thought we had these
19 clips cued up.

05:48:54

20 *****
21 (Video played as follows.)

22 DR. DENNEY: Okay. Very good. Okay.
23 Mr. Brockman, we're back onto the video, and we just have
24 one procedure to go through. It should go pretty quickly.
25 Okay?

05:49:17

ROBERT DENNEY, Ph.D. - CROSS BY MR. LOONAM

1 MR. BROCKMAN: Well, depending upon how you
2 define "pretty quickly," yeah, it's okay.

3 DR. DENNEY: All right. Yeah. Yeah.

4 Well, it's a multiple-choice
05:49:29 5 questionnaire. Okay? So, I'll just read the instructions
6 and then we'll charge ahead. All right.

7 I would like to ask you some questions
8 regarding your indictment, because your memory of the
9 details of what is alleged in the indictment pertaining to
05:49:47 10 the charges against you are important.

11 I realize things have changed for you in
12 such a way as to make your memory a significant concern. I
13 do not want you to tell me any private information
14 discussed between you and your lawyers. I am not asking
05:50:03 15 about that. All I am asking is questions about your
16 indictment -- okay? -- the document itself. I'm not asking
17 you to tell me anything that's not already in the public
18 domain.

19 Because your memory for these events is a
05:50:23 20 concern, I wanted to document just how much memory loss
21 you -- you have in regards to your indictment. Okay?

22 So, in -- in what district court -- and
23 every question I've got has got a multiple choice. I'm
24 going to ask -- I'm going to read the question, and I'm
05:50:47 25 going to give you the options. Okay? And I'd like for you

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1 to choose an option to the best of your memory.

2 And if you don't remember something, I
3 appreciate that. Just make your best guess. Okay?

4 In what district court were you first
05:51:01 5 indicted? Eastern District of Texas or the Northern
6 District of California?

7 MR. BROCKMAN: I have no idea.

8 DR. DENNEY: Okay. Best guess. Eastern
9 District of Texas or Northern California?

05:51:24 10 MR. BROCKMAN: I can only guess. I don't --

11 DR. DENNEY: Sure.

12 MR. BROCKMAN: I don't think I should be
13 guessing.

14 DR. DENNEY: Well, that's okay. Guessing is
05:51:35 15 fine.

16 Eastern District of Texas or you think the
17 Northern District of California?

18 MR. BROCKMAN: Eastern District of Texas.

19 DR. DENNEY: Okay. In what division was --
05:51:51 20 actually -- it was the Northern District of California,
21 actually.

22 In what division was the indictment first
23 filed in the Northern District of California? San
24 Francisco Division or Oakland Division?

05:52:04 25 MR. BROCKMAN: I have no idea.

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1 DR. DENNEY: Best guess.

2 MR. BROCKMAN: I'd say San Francisco.

3 DR. DENNEY: Okay. That's right.

4 (Video concluded.)

05:52:18

5 *****

6 BY MR. LOONAM:

7 Q. And, so, this is a -- a different test you're
8 administering here that resembles a forced-choice test.
9 Is that fair?

05:52:34

10 A. It is. It is a forced-choice questionnaire related
11 to details in the indictment.

12 Q. And it's -- it's -- it's almost -- almost a catch-22
13 in some ways. Correct?

14 A. No.

05:52:51

15 Q. Well, if Mr. Brockman receives a passing score on the
16 test as it's designed, he would demonstrate -- or you
17 would argue he would demonstrate a factual understanding
18 of the case against him. Correct?

19 A. No. I would say he would have memory for the
20 indictment.

05:53:14

21 Q. And that would be part of establishing that he had
22 factual understanding of the indictment. Correct?

23 A. Yeah. It would go -- it would go into it, sure.
24 Sure.

05:53:25

25 Q. And then if he --

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1 **A.** But it's more focused on memory.

2 **Q.** -- if he can't remember and doesn't know --

3 **A.** Right.

4 **Q.** -- and fails, then he's -- he would be malingering.

05:53:34

5 Correct?

6 **A.** No.

7 **Q.** If he fails, he is not -- Oh. If he fails, he is
8 exaggerating his symptoms. Correct?

9 **A.** I'm sorry. You've got to define exactly what you

05:53:44

10 said --

11 **Q.** Okay.

12 **A.** -- what you're asking.

13 **Q.** There are three possibilities with respect to this
14 test.

05:53:49

15 **A.** Okay.

16 **Q.** There is a pass that shows that he understands the
17 indictment. Right? There is chance?

18 **A.** Okay. I see what you're doing.

19 **Q.** Okay? And then there is a fail.

05:53:59

20 Fail evidences or would go towards
21 malingering. Pass --

22 **A.** Sure.

23 **Q.** -- goes towards competence and a factual
24 understanding of his case?

05:54:13

25 **A.** Well, knowledge. A memory for the indictment is what

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1 it would go to.

2 Q. And it just so happened -- what did -- what happened
3 with Mr. -- Mr. Brockman? He scored within the chance
4 range. Correct?

05:54:24 5 A. Yeah. He put it right about 50 percent. Actually,
6 below 50 percent, if I recall.

7 Q. 46 percent?

8 A. 46 percent.

9 Q. Yeah. He got about 46 percent.

05:54:32 10 And during the -- the test, you -- you
11 provide feedback to him on whether he's getting the
12 answers correct or not?

13 A. Yes. Generally speaking, that's true.

14 Q. And at times during this -- administering this test
05:54:59 15 to Mr. Brockman, at any point of the test did you grow
16 frustrated with Mr. Brockman?

17 A. I don't remember.

18 Q. Do you recall whether or not you expressed any
19 frustration with Mr. Brockman during the course of
05:55:12 20 administering this test?

21 A. I do not.

22 MR. LOONAM: Okay. Your Honor, I think we are
23 at a good place to stop for now.

24 THE COURT: Okay. Then, we will take -- or
05:55:21 25 recess now. We will start again tomorrow morning at 9:00.

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1 As far as the schedule for tomorrow, I do
2 have a hearing at 5:00 tomorrow afternoon; so, we are going
3 to have to end by 5:00 tomorrow.

05:55:38

4 What do we have on tap for witnesses? We
5 are going to finish this witness, obviously.

6 MR. LOONAM: Yes, Your Honor. And then I -- I
7 don't know. Tomorrow we had agreed to take a witness out
8 of order, one of the government's doctors, but after lunch.

9 MR. SMITH: Your doctor.

05:55:54

10 MR. LOONAM: One of the defense doctors after
11 lunch.

12 MR. LANGSTON: Which one? Your Honor, I have
13 an e-mail box full of witnesses giving their stories for
14 why they absolutely have to testify in the morning
15 tomorrow. So, we are going to sort of sort those out when
16 I get downstairs, but we will send the list as soon as we
17 have it available.

05:56:07

18 THE COURT: Do we need to start earlier
19 tomorrow?

05:56:16

20 MR. LANGSTON: I do think that would be helpful
21 if the Court is available.

22 THE COURT: Let me just -- I need to check with
23 my staff. I know I'll be available. I just need to check
24 and make sure that everybody can make it.

05:56:33

25 **(Court confers with staff)**

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1 THE COURT: So, I think everybody is good with
2 8:30 tomorrow. That gives us an additional 30 minutes.

3 MR. SMITH: That's fine with the government,
4 Your Honor, yes.

05:56:40

5 THE COURT: And that will give us a little
6 bit -- I mean, it's probably not going to help you all the
7 way out with your witnesses, but it's 30 minutes.

8 MR. LANGSTON: Hey, that's better than nothing.
9 That helps.

05:56:49

10 THE COURT: Okay. Because we are not going to
11 be able to go this late tomorrow because I have got a
12 hearing tomorrow. So, tomorrow is going to be a pretty
13 hard cutoff at 5:00.

14 MR. LOONAM: Understood, Your Honor.

05:56:59

15 MR. VARNADO: And, Your Honor, we have had some
16 conversations also with the government. I think there is
17 six witnesses on their list after this particular witness.
18 There is ten on the defense witness list. It seems --

05:57:12

19 THE COURT: We will keep going. We will keep
20 going. I have a trial scheduled for Monday, but this has
21 already started. This is a criminal hearing. It's got
22 precedent. So, they are going to have to wait. So, if we
23 can't get it done by Friday, we just keep going.

05:57:30

24 MR. LANGSTON: And, Your Honor, you don't
25 necessarily need to give us this information now, but I

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1 think in one of our status conferences you indicated
2 potential interest in maybe working over the weekend.

3 THE COURT: That's an alternative as well, I
4 mean, to try to get people accommodated. I would have to
05:57:45 5 check with my staff about that. I am okay, but it's not --
6 I can't speak for my staff because it's their weekend as
7 well.

8 MR. LANGSTON: Okay.

9 THE COURT: So, let me talk to them. If
05:57:54 10 everybody is okay, then, Saturday is fine. I don't have a
11 problem with that. But we will definitely start tomorrow
12 morning at 8:30. That will give you at least another 30
13 minutes -- additional 30 minutes to work with.

14 MR. LOONAM: Thank you, Your Honor, and your
05:58:11 15 staff. Thank you.

16 THE COURT: Not a problem. You guys have a
17 good night.

18 MR. LANGSTON: Actually, Your Honor, if you
19 have a moment, there is just one issue we want to flag for
05:58:18 20 the Court.

21 THE COURT: Sure.

22 MR. LANGSTON: So, on Friday we received a
23 subpoena return from UCSH, and among those -- you know, it
24 is a subpoena for between Jim Jackson, who I believe is
05:58:27 25 going to be one of the defense witnesses, and Tommy Barras,

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1 who was one of the government witnesses. And, you know,
2 late in the day yesterday we received an additional
3 production. It was a single document. That document was
4 an e-mail between -- written by Mr. Jackson to Mr. Barras
05:58:46 5 reporting on Mr. Jackson's meeting with IRS agents, where
6 Mr. Jackson --

7 MR. VARNADO: Before we just read this into the
8 record, what's the issue we're addressing?

9 THE COURT: Yeah.

05:58:55 10 MR. LANGSTON: So, we tried to have some
11 conversations with UCSH. Obviously, we're concerned, and I
12 think if you hear what the document says that will express
13 sort of the nature of our concern, that maybe we still do
14 not have a whole production. And, so, we may need to take
05:59:11 15 either Mr. Barras or Mr. Jackson out of turn, and we may be
16 coming to you for a ruling concerning -- you know, we want
17 to make sure we get a full production here.

18 MR. VARNADO: This is the first we are hearing
19 about it. We are happy to talk with the government.

05:59:26 20 THE COURT: Well, why don't you guys talk about
21 it and then --

22 MR. VARNADO: We don't have a document.

23 MR. LANGSTON: It's not the defendant. It's
24 Reynolds and Reynolds, which is the defendant's former
05:59:33 25 company.

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1 THE COURT: Okay.

2 MR. LANGSTON: So, as I said, you know, we --
3 it's an issue we did want to flag for the Court. And to
4 the extent that the defense has an issue here, it's because
05:59:41 5 we may need to be moving witnesses around.

6 THE COURT: Okay. Well, bring -- why don't you
7 guys bring me the issue tomorrow morning after thinking it
8 through. If you just got it, I want you guys to think it
9 through, and I want a presentation of issues and then a
05:59:57 10 proposed solution.

11 MR. LANGSTON: Okay.

12 THE COURT: So, instead of me guessing what's
13 going on and how to accommodate everyone, tell me, 'Here is
14 the issue. Here's how I'd like to solve it. Anybody
06:00:06 15 object?' I'll look at my schedule, look and see what needs
16 to be ruled on, and we will go from there.

17 MR. LANGSTON: Great.

18 THE COURT: Have a good night, everyone. We
19 will see you all at 8:30 tomorrow.

06:00:18 20 THE CASE MANAGER: All rise.

21 (Recessed at 6:00 p.m.)
22
23
24
25

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COURT REPORTER'S CERTIFICATE

I, Kathleen K. Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: 11/19/21

/s/ Kathleen K. Miller

Kathleen K. Miller, RPR, RMR, CRR

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